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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, Deceased,
Petitioner,

v.

ALUSUISSE FLEXIBLE PACKAGING,
INC., DAVID ELLISON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER ACCESS TO FEDERAL COURTS SHOULD BE EXPANDED BY ALLOWING THE THIRTY DAY PERIOD TO REMOVE AN ACTION FROM STATE COURT TO BEGIN ANEW WITH SERVICE UPON EACH DEFENDANT.

II. WHETHER THE ONE (1) YEAR LIMITATION ON REMOVAL OF DIVERSITY CASES SET FORTH IN 28 USC § 1446(b) APPLIES TO ALL CIVIL ACTIONS, OR ONLY TO THOSE THAT ARE NOT INITIALLY REMOVABLE.

III. WHETHER THE DISTRICT COURT HAS JURISDICTION TO CONSIDER THE REMOVAL OF AN ACTION FROM STATE COURT ON THE SAME BASIS (DIVERSITY) THAT THE DISTRICT COURT HAD TWICE PREVIOUSLY REMANDED THE ACTION TO STATE COURT.

IV. WHETHER A DEFENDANT THAT HAS FAILED ON TWO EARLIER ATTEMPTS TO REMOVE AN ACTION TO FEDERAL COURT CAN THEREAFTER CONSENT TO A REMOVAL PETITION FILED BY ANOTHER DEFENDANT NAMED IN THE ORIGINAL COMPLAINT.

V. WHETHER SUMMARY JUDGMENT IS APPROPRIATE TO PREVENT A JURY FROM INFERRING DELIBERATE INTENT IN A CIVIL CASE UNDER FACTS THAT WOULD SUPPORT A CRIMINAL CONVICTION.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are as follows:

Jeffrey Brierly, Administrator of the Estate of Paul Brierly, Deceased, Petitioner; and

Lawson Mardon Flexible, Inc., f/k/a Alusuisse Flexible Packaging, Inc., Respondent; and

David Ellison, Respondent.

The Petitioner is not a corporation.

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The Amended Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix, p. 3a, and is reported at 184 F. 3d 527 (1999). The original Opinion of the Sixth Circuit is set forth in the Appendix, p. 25a, and is reported at 170 F. 3d 583 (1999). The Memorandum Opinion and Order, and Judgment of the United States District Court for the Eastern District of Kentucky at Frankfort, entered September 4, 1997, is set forth in the Appendix, p. 46a, and is not reported. The Memorandum Opinion and Order of the District Court entered January 30, 1996, is set forth in the Appendix at p. 61a, and is reported at 913 F. Supp. 517 (E.D. Ky. 1996). The Memorandum Opinion and Order of the District Court entered October 18, 1995, is set forth in the Appendix, p. 72a, and is not reported. The Memorandum Opinion and Order of the District Court entered July 17, 1995 is set forth in the Appendix, p. 79a, and is not reported. The Memorandum Opinion and Order of the District Court entered March 30, 1995, is set forth in the Appendix, p. 82a, and is not reported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The United States Court of Appeals for the Sixth Circuit entered an Amended Judgment on June 10, 1999, and denied a timely petition for rehearing by Order entered July 30, 1999.

The jurisdiction of this Court is invoked under 28 USC § 1254.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

28 USC § 1446 & 1447

JURISDICTION AND VENUE

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, which ever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may

not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing

shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.
(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 83, 63 Stat. 101; Sept. 29, 1965, P.L. 89-215, 79 Stat. 887; July 30, 1977, P.L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, P.L. 100-702, Title X, § 1016(b), 102 Stat. 4669.)

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USC § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.
(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 84, 63 Stat. 102; July 2, 1964, P. L. 88-352, Title IX, § 901, 78 Stat. 266; Nov. 19, 1988. P.L. 100-702, Title X, § 1016©. 102 Stat. 4670.)

KENTUCKY RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

CR 3. COMMENCEMENT OF ACTION FEES AND COSTS

CR 3.01 Commencement of Action

A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Source: FRCP 3; CC 39; KRS 413.250.

KRS Chapter 342

LABOR AND HUMAN RIGHTS

342.610. Liability for compensation. – (1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.

(2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefore. A person who contracts with another (a) to have work performed consisting of the removal, excavation or drilling of the soil, rock or mineral, or the cutting or removal of timber from land, or (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business,

occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

(3) Liability for compensation shall not apply where injury, occupational disease, or death to the employee was proximately caused primarily by his intoxication or by his willful intention to injure or kill himself or another.

(4) If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons. (Enact. Acts 1972, ch. 78, § 1, effective January 1, 1973.)

STATEMENT OF THE CASE

This is a wrongful death action filed by the Estate of Paul Brierly, ("Brierly") a 19 year old co-op student who was killed in a fire and resulting explosion at the Alusuisse Flexible Packaging, Inc. ("Alusuisse") plant in Shelbyville, Kentucky on August 30, 1993. The case was removed to federal court on three occasions, twice by Alusuisse (who also filed a motion to reconsider the first Order of remand) and once by Ellison. From June 8, 1994 until January 30, 1996, the parties litigated the forum in which the case would be heard. Jurisdiction in the United States District Court for the Eastern District of Kentucky at Frankfort, as explained below, is purportedly based upon diversity of citizenship as provided in 28 USC § 1332.

At the time of his death, Mr. Brierly was attending Shelby County Vocational School and was working as a co-op student with Alusuisse, under the supervision of David Ellison, among others. After he was killed in the explosion, his estate elected to forego its statutory right to Workers' Compensation benefits, and instead filed the within tort action in the Shelby County, Kentucky Circuit Court. Summons were issued that same day, May 12, 1994, for all Defendants, including David Ellison.

On June 8, 1994, Alusuisse, on the unsupported allegation that Ellison was not a citizen of Kentucky, removed the action to the United States District Court for the Western District of Kentucky at Louisville. Ellison, who had not yet been served, did not join in or file a consent to Alusuisse's removal petition. The case was then transferred to the District Court for the Eastern District of Kentucky at Frankfort. The action was remanded to state court on Brierly's motion, after the Court concluded that Alusuisse had

"utterly failed to introduce any evidence whatsoever" to establish that Ellison had changed his domicile from the state of Kentucky. The action was remanded to the Shelby Circuit Court on March 30, 1995.

Alusuisse then pursued a two-pronged attack to keep the case out of state court. On April 7, 1995, it filed a motion to reconsider the Order remanding the case to Shelby Circuit Court, and it filed a second notice of removal. The motion to reconsider was denied due to a lack of jurisdiction following remand, 28 USC § 1447(d), by Order entered July 17, 1995.

The second Notice of Removal was based upon an alleged "subsequent event" making the action removable. The "event" was an Order by the same District Court judge in another case arising from the same explosion, in which the Court concluded that Ellison had changed his domicile from Kentucky to Wisconsin on or before May 9, 1994, three (3) days prior to Brierly filing his action in Shelby Circuit Court. Although Alusuisse and Ellison were co-defendants in the other case, Ellison had not been served in the Brierly case, and did not join in or consent to Alusuisse's second Notice of Removal.

The second removal was remanded on Brierly's motion, with the Court noting:

> "A party cannot allow its opportunity to invoke federal jurisdiction to pass where it was in possession of facts which revealed the diversity of the parties. To allow such a method of removal would be to open an avenue allowing a defendant to keep litigation at bay, possibly for years."

The Order remanding the case once again to the Shelby Circuit Court was entered October 18, 1995, more than one (1) year after the action was commenced.

Ellison did not consent to either of Alusuisse's notices of removal, or the motion to reconsider, because he had not been served at the time Alusuisse filed those papers. Brierly had issued a summons for Ellison on May 12, 1994, to be served by the Shelby County Sheriff at his place of employment. In August of 1994, Alusuisse informed Brierly of a "business" address for Ellison in the state of Wisconsin. However, the District Court ordered a stay of proceedings, and service was not therefore effected upon Ellison.

Following the October 18, 1995 Order remanding the case to state court, on October 25, 1995, Brierly filed a motion for leave to file an Amended Complaint in Shelby Circuit Court, which was granted by the Court on November 8, 1995. Alusuisse filed in the state court a Motion to Stay Proceedings, citing a pending criminal action arising from the same explosion. However, service had now been effected upon Ellison, and on November 30, 1995, eighteen (18) months after commencement of the action, he filed a Notice of Removal on the basis of diversity. Alusuisse filed a notice of its consent to Ellison's removal on the same day.

Brierly then filed his third Motion to Remand this case to state court, citing several reasons that he believed removal was inappropriate. Specifically, he claimed (1) that 28 USC § 1447(d) divested the district court of jurisdiction to consider removal on the same basis the case had previously been remanded; (2) that 28 USC § 1446(b) prohibits removal of a case on the basis of diversity of citizenship more than one year after commencement of the action; (3) that published opinions within the Eastern District of Kentucky had adopted

the "first-served" defendant rule, i.e. that the 30 day limitation of 28 USC § 1446(b) begins to run with service on the first defendant; and (4) that Alusuisse, having failed in two attempts to remove the action, was prevented by the "rule of unanimity" from tendering a valid consent to Ellison's Notice of Removal.

On January 30, 1996, the District Court denied Brierly's motion to remand. Thereafter Alusuisse and Ellison filed motions for summary judgment, contending that proof of a specific, subjective intent to cause injury or death was necessary to submit the case to a jury. Brierly argued that intent could be inferred by a jury because death was a natural and foreseeable consequence of welding in an area laden with combustible solvents. Ellison had been warned that commencement of the welding operation was unsafe, but he nevertheless gave the go-ahead to proceed. Moreover, conducting welding operations under the conditions present was a violation of several federal safety regulations.

If a jury would be allowed to infer the intent necessary to convict a person in a criminal case under such facts, and deprive him of his liberty, Brierly argued that it should be allowed to do so in a civil case to overcome the exclusive remedy provisions of a Workers' Compensation Act. The District Court disagreed, and on September 4, 1997, entered summary judgment in favor of Alusuisse and Ellison.

Petitioner timely filed a Notice of Appeal to the Sixth Circuit Court of Appeals, which rendered an Opinion and Judgment affirming the District Court on March 12, 1999. Brierly then timely filed a Petition for Rehearing and Suggestion for En Banc Consideration. On June 10, 1999, the three judge panel rendered an Amended Judgment and Amended Opinion. Brierly then filed a Memorandum of Law

Supplementing his Original Petition for Rehearing and Suggestion for En Banc Consideration. By Order entered July 30, 1999, the petition was denied. Brierly has now filed the within Petition for Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

1. The Decision of the Sixth Circuit Court of Appeals, in creating a pure "last-served Defendant" rule, is in conflict with every other Court of Appeals to consider application of the 30 day removal period provided by 28 USC § 1446(b).

Four Circuit Court's of Appeals have addressed the question of whether the 30 day period after service of process within which to remove an action to federal court on the basis of diversity of citizenship begins to run with service on the first-served defendant, or whether a new 30 day clock begins to run with service upon each defendant. Prior to the decision of the Sixth Circuit in this case, the Circuit Courts were unanimous that the 30 day period begins to run with service on the first-served defendant.

The Fifth Circuit, in *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986) adopted a bright-line rule that the failure of the first-served defendant to file a notice of removal within 30 days prevents all subsequently served defendants from later removing the action to federal court, unless there is evidence that the plaintiff intentionally delayed naming other defendants in a bad-faith attempt to prevent removal. It thereafter added the requirement in *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1263 (5th Cir. 1988) that all served defendants "must join in the petition

no later than thirty days from the day on which the first defendant was served." (emphasis added).

The Ninth Circuit, in *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989), citing the rule of unanimity, held that if the first-served defendant has failed to effect timely removal within 30 days of service upon it, such defendant cannot thereafter consent to removal attempted by a later-served defendant. *See also* 1A James W. Moore, et al., *Moore's Federal Practice* § 0.168 [3.5-5], at 586-87 (2d ed. 1992).

The Fourth Circuit, in *McKinney v. Board of Trustees of Maryland Com. Col.*, 955 F. 2d 924 (4th Cir. 1992) was confronted with the question of "whether B has thirty days from the time he himself is served to join the removal petition, or must join within 30 days of A's service" (*Id* at p. 926 emphasis added), when B has been served within thirty days of service upon A. The Court addressed the "first-served, last-served" question presented herein as follows:

> "While the first served defendant clearly must petition for removal within 30 days..." *Id.*, p. 926 emphasis added.

Again, at footnote 3 on p. 926 of the Opinion, the Fourth Circuit states:

> "In a different situation, where B is served more than 30 days after A is served, two timing issues can arise, and the law is settled as to each. First, if A petitions for removal within 30 days, the case may be removed, and B can either join in the petition or move for remand. *See* 28 USC § 1448. Second, if A

does not petition for removal within 30 days, the case may not be removed. *See*, e.g. *Quick Erectors, Inc. v. Seattle Bronze Corp.*, 524 F. Supp. 351, 354 (E.D. Mo. 1981)." Emphasis added.

The Court ultimately concluded, at p. 928:

"...we hold that under 28 USC § 1446(b), individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." (Emphasis added).

The Fourth Circuit in *McKinney*, *supra*, was highly critical of the Fifth Circuit decision in *Getty Oil*, supra, as being "unfair" to later-served defendants. Nevertheless, it was clear that the right of the later-served defendant was to join in an otherwise valid removal petition. Virtually every court to discuss *McKinney* cites the case for holding that the later-served defendant can join in a pending removal petition, **but note that if there is no such petition pending, the case may not be removed.** *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F. Supp. 932, 935 (D. Md. 1997); *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266, 270 (W.D. Wis. 1997); *McShares, Inc. v. Barry*, 979 F. Supp. 1338, 1344 (D. Kan. 1997); *Scialo v. Scala Packing Co., Inc.*, 821 F. Supp. 1276, 1278 (N.D. Ill. 1993); *Weimer v. City of Johnstown, N.Y.*, 931 F. Supp. 985, 991 ft. 6 (N.D. N.Y. 1996); *Yellow Cab Co. of Pittsburgh v. Gasper*, 994 F. Supp. 344, 347 (W.D. Pa. 1998).

The Sixth Circuit, however, while adopting the policy considerations articulated in *McKinney*, *supra*, creates an absolute right of removal in later-served defendants whether

prior-served defendants have exercised their opportunity to remove or allowed it to lapse. For numerous and compelling reasons, the Petitioner respectfully submits that this Court should grant certiorari and reverse the Sixth Circuit.

First, the creation of a pure last-served defendant rule opens the door for repeated journeys to federal court to decide the preliminary issue of which forum will hear the case. This not only undermines the concept of comity between state and federal courts, but also shifts the burden of proving complete diversity away from the party seeking to invoke federal jurisdiction.

It is generally recognized that in crafting the removal statutes, Congress intended to minimize the interference with state court jurisdiction, as is evidenced by the provisions of 28 USC § 1447(d) that an order remanding a case to state court is not reviewable "on appeal or otherwise". As stated by the First Circuit Court of Appeals in *La Providencia Development Corporation*, 406 F2d 251, 252 (1st Cir. 1969):

> "Removal in diversity cases, to the prejudice of state court jurisdiction is a privilege to be strictly construed...[citing *Shamrock Oil & Gas v. Sheets*, 313 US 100, 61 S. Ct. 868, 85 L. Ed 1214 (1941)]... and the state court proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court." (Emphasis added).

As noted by Justice Rehnquist in his dissenting opinion in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 354, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976):

> "...The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court."

By adopting a pure last-served defendant rule, the Sixth Circuit has opened the door to successive removal petitions limited only by the number of defendants. Indeed, the case sub judice was removed from state court on three separate occasions, resulting in a delay of more than 19 months in prosecution of the action on its merits.

Second, by permitting later-served defendants an independent right to seek removal within 30 days of being served, the Sixth Circuit effectively shifts the burden of proof in removal petitions from the party seeking to invoke diversity jurisdiction (after all, if they fail, subsequently served defendants will provide another bite at the apple) to the party seeking remand (if unable to prove lack of diversity, that party can be subjected to repeated removal petitions until all named defendants have actually been served). Such a result literally wipes out over 110 years of precedent as first established by this Court in *Carson v. Dunham*, 121 US 421, 425-426 (1886), i.e. that the burden of proving diversity jurisdiction is on the party attempting to invoke federal jurisdiction. *See also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144 (1921).

Although the Sixth Circuit contends that such problems can be avoided by the Plaintiff arranging for all defendants to be served at about the same time, the within case is a classic

example of how that is often not possible. Instead, Petitioner submits that the first served defendant, if it desires to remove an action, should supply the Court with affirmative proof of complete diversity of all parties; if it is unable to do so, the case should be remanded to state court permanently [unless it becomes "subsequently removable" for a reason espoused in § 1446(b).][1]

Otherwise, as Justice Rehnquist noted in the dissenting opinion in *Thermtron Products, Inc.*, *supra*, at p. 336 "...federal removal provisions may become a device affording litigants a means of substantially delaying justice." Indeed, this case provides an excellent example of just how long justice can be delayed, as the parties bounced back and forth from state to federal court from May 12, 1994 until January, 1996. Coincidentally, Alusuisse was under indictment in Shelby Circuit Court throughout this time.

Finally, adoption of a pure last-served defendant rule abolishes the near universal rule that if a first-served defendant fails to effect timely removal within its 30 day period, it cannot thereafter tender a valid consent or join in a later-served defendant's removal petition. This particular facet of the "rule of unanimity" was relied upon by the Ninth Circuit in *Cantrell*, *supra*, and alluded to in footnote 3 of the Fourth Circuit's opinion in *McKinney*, *supra*.

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[1] Here, Alusuisse was a co-defendant with Ellison in another pending action arising from the same fire that killed Paul Brierly, and could have easily supplied the Court with evidence of Ellison's citizenship when Alusuisse filed its first notice of removal. Additionally, it was Alusuisse that informed Brierly of Ellison's "business address". Instead, evidence of Ellison's citizenship was not presented until he was served, over 16 months later, the delay having been caused by the District Court's Stay Order.

Clearly, if the decision of the Sixth Circuit is allowed to stand, it will open the floodgate to litigation on an issue that was heretofore fairly well-settled. The federal courts will be subjected to repeated removal petitions on the same case, state courts will be repeatedly interrupted, and aggrieved parties will be repeatedly delayed from litigating the merits of the underlying action. Such a result is certainly at odds with the concept of comity between the state and federal courts, and the policy considerations articulated by this Court in *Shamrock Oil & Gas v. Sheets*, 313 US 100, 108-109, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941), i.e. that the removal statute is to be strictly construed against removal.

Accordingly, Petitioner respectfully urges the Court to grant certiorari to remove the conflict among the Circuit Courts as to application of the 30 day removal period set forth in 28 USC § 1446(b).

2. The Court should grant certiorari to address the question of whether the 1988 Amendment to 28 USC § 1446(b), creating a one-year limitation on diversity removal, and this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467 (1996) apply to all civil actions, or only to those not initially removable.

28 USC §1446(b) states in pertinent part as follows:

> "The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based...

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 (diversity of citizenship) of this title more than one (1) year after commencement of the action."

In *Caterpillar, Inc. v. Lewis*, *supra*, a case involving the eventual dismissal of non-diverse parties, Justice Ginsburg addressed the one-year limitation of § 1446(b) as follows:

> "When a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship, the defendant or defendants may remove the action to federal court, 28 USC 1441(a), provided that no defendant "is a citizen of the State in which such action is brought," § 1441(b). In a case not originally removable, a defendant who receives a pleading or other paper indicating the post-commencement satisfaction of federal jurisdictional requirements-for example, by reason of the dismissal of a nondiverse party-may remove the case to federal court within 30 days of receiving such information. § 1446(b). No case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year after

commencement of the action'." (emphasis added)

The Kentucky Rules of Civil Procedure, CR 3.01, states:

> "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

The within action was commenced on May 12, 1994. Ellison's removal petition was filed more than 18 months later, on November 30, 1995.

The Sixth Circuit concluded that in enacting the 1988 amendment to 28 USC § 1446 (b), Congress intended the one-year limitation to apply only to cases that were not initially removable. It further concluded that the language of this Court in *Caterpillar*, *supra*, was limited in its application to cases that were not initially removable. The same position has been adopted by the Ninth Circuit in *Ritchey v. Upjohn Drug Co.*, 139 F. 3d 1313 (9th Cir.), *cert. denied* 119 S. Ct. 407 (1998). *See also New York Life Ins. Co. v. Deshotel*, 142 F. 3d 873 (5th Cir. 1998).

With all due respect to the Circuit Courts, the Petitioner reads this Court's decision in *Caterpillar*, *supra*, as a blanket prohibition on the removal of diversity actions more than one year after commencement of the action, whether initially removable or not. Such an interpretation is in keeping not only with the general purposes of the 1988 amendment, to-wit: restrict diversity jurisdiction, but also with the well-settled rule that the removal statute is to be strictly construed against removal.

While the Circuit Courts to consider the question are apparently in harmony, the District Courts are sharply divided, with at least one District Court concluding it is jurisdictional. *See Green Point Savings Bank v. Hidalgo*, 910 F. Supp. 89, (E.D.N.Y. 1995). Additionally, because a remand order is not reviewable "on appeal or otherwise", 28 USC § 1447(d), Petitioner submits that it is imperative that the District Courts receive a definitive answer from the Supreme Court as to the correct application of the one-year limit of § 1446(b). Accordingly, Petitioner respectfully urges the Court to grant certiorari.

3. The Court should grant certiorari to prevent further erosion of its ruling in *Shamrock Oil & Gas v. Sheets*, *supra*, that the removal statute "...must be strictly construed against removal."

This Court's decision in *Shamrock Oil & Gas v. Sheets*, *supra*, is universally construed as requiring that the removal statute be strictly construed against removal. While the Sixth Circuit acknowledged this guiding principal, it considered three issues of first impression in the case at bar (the 30-day rule, the one-year limitation, and the appropriateness of a removal petition filed by a subsequently-served defendant asserting the same jurisdictional basis on which the action was previously remanded), and ruled in favor of removal on all three issues.

Petitioner views this as part of a growing trend in which the lower Courts pay lip service to *Shamrock Oil & Gas v. Sheets*, *supra*, and its progeny, but then construe the statute in a way to expand access to the federal court. *See Ritchey v. Upjohn Drug Co.*, *supra*; *New York Life Ins. Co. v. Deshotel*, *supra*; *Freeman v. Bechtel*, 936 F. Supp. 320

(M.D.N.C. 1996); *Zogbi v. Federated Dep't Store*, 767 F. Supp. 1037 (D.D. Cal. 1991).

Petitioner respectfully prays that the Court will take this opportunity to emphasize to the lower Courts that *Shamrock Oil & Gas v. Sheets*, *supra*, is still the law of the land, and its direction to strictly construe the removal statute against removal must be followed. Otherwise, Petitioner anticipates that the trend toward expanding diversity access to federal court will accelerate, and *Shamrock* will become a mere footnote in the history of statutory construction.

4. The Court should grant certiorari to address the application of 28 USC § 1447 (d) to removal petitions filed by later-served defendants named in the original Complaint, asserting the same basis for jurisdiction on which an earlier-served defendant's removal petition was remanded by the District Court.

28 USC § 1447 (d) provides as follows:

> "(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

Here, Alusuisse removed the case from state to federal court on two separate occasions, both of which relied upon diversity of citizenship as the jurisdictional basis. Although Alusuisse was a co-defendant with Ellison in another pending action arising from the same fire that killed Paul Brierly, and

was aware of his whereabouts in Wisconsin, it failed to support either of its removal petitions with affirmative proof that Ellison was no longer domiciled in Kentucky as had been alleged in the Complaint. As a result of Alusuisse's failure to establish diversity, the District Court remanded the case to state court on both occasions.[2] However, when Ellison filed his removal petition asserting the same basis for jurisdiction as did Alusuisse, the District Court concluded that since he was not technically a party to Alusuisse's unsuccessful attempts at removal, he was not barred from asserting diversity in his own petition.

The Sixth Circuit then concluded that it would be unfair to Ellison to prevent him from effecting removal, since he had not been served with process when Alusuisse's petitions were being considered. Thus, the Court reasoned, Ellison's removal petition was not the functional equivalent of a motion to reconsider the remand order, but was a completely separate petition entitled to consideration on its own merits. Of course, this ruling was only possible because the Court was also adopting a pure "last-served defendant" rule, discussed infra.

In Petitioner's view, this conclusion by the Sixth Circuit Court of Appeals is in conflict with decisions of the First and Tenth Circuit Courts of Appeals. Specifically, in *Chandler v. O'Bryan*, 445 F2d 1045 (10th Cir., 1971), at p. 1057, the Court stated:

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[2] Although Brierly argued in opposition to the second removal that the Court lacked jurisdiction pursuant to §1447(d), the Court remanded on the basis that its Order in another pending case, issued months earlier, was not a "subsequent event" as contemplated by 28 USC § 1446.

> "Under the provisions of 28 USC § 1447 (d) an order remanding a removed case to a state court is not reviewable...Thus, so far as the question of a forum in which a cause is to be litigated is concerned, the determination of a federal district court that a case is not removable and remanding it to a state court is final. *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 US 556, 583, 16 S. Ct. 389, 40 L. Ed. 536 (1886).
>
> Therefore, since Judge Austin...determined that the case should be remanded for trial in the state court, that decision is res judicata as to any further attempts to litigate the same issues in a federal court." (Emphasis in original).

The First Circuit Court of Appeals considered the propriety of a second removal petition in *Federal Deposit Ins. Corp. v. Santiago Plaza*, 598 F. 2d 634 (1st Cir. 1979) and concluded at p. 636:

> "The law in this circuit is clear that once a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action. (citation omitted) This is true no matter how erroneous the district judge may later decide his remand decision was. 'The district court has one shot, right or wrong.' (citation omitted) This rule is not an aberration from the general rule...Rather, it is based upon the statutory command that '[a]n order remanding a case to the State Court from

> which it was removed is not reviewable on appeal or otherwise' 28 USC § 1447 (d)..." (Emphasis added).

The Petitioner respectfully submits that in the case at bar, the notice of removal filed by Ellison, but based upon the same grounds previously ruled upon by the Court (diversity jurisdiction), could no more "reinvest" the District Court's jurisdiction than if it had been filed by Alusuisse. Because Petitioner views this holding of the Sixth Circuit to be yet another example of the erosion of *Shamrock Oil & Gas Corp. v. Sheets*, *supra*, and believes it to further render § 1447 (d) meaningless until all defendants have been served, he respectfully prays that the Court will grant certiorari.

5. The Court should grant certiorari, because the lower Courts are imposing a burden of proof on summary judgment in a civil action that exceeds the burden of proof necessary to support a criminal conviction.

KRS 342.610(4) provides that if injury or death results to an employee "...through the deliberate intention of his employer to produce such injury or death...", the personal representative can proceed with an action at law as if the Workers' Compensation Act, KRS Chapter 342, had not been passed. In *Louisville and Jefferson County v. Travelers Ins.*, 753 F2d 533 (6th Cir. 1985), the Court held at p. 538:

> "Taken literally, *Trautwein* holds that an unlawful act is all that needs to be proven: 'malice may be presumed from the unlawful act itself'...Distler willfully performed an illegal act under conditions where it was manifest that damage would result.

> ...There can be no doubt that the evidence in this case established an intentional act from which damage 'manifestly' could or would result...
>
> ...Where a deliberate act is required to bring about the damage, proving the act provides sufficient evidence of a deliberate intention to inflict the damage. Intent to damage the property can be presumed from circumstantial evidence of a deliberate act which ordinarily would cause such damage."

In this case, the deposition testimony established that: (1) a strong odor of combustible vapors was present such that introduction of a spark would ignite and cause a fire and/or explosion, and David Ellison was informed of this hazard by other employees; (2) serious injury or death was a natural and probable consequence of welding in an atmosphere charged with combustible vapors (3) David Ellison, as plant safety manager, had to give his approval for welding to commence; (4) that federal safety regulations were violated by not obtaining a reading of the lower explosive limits (LEL) prior to commencement of the welding; (5) David Ellison and others intentionally directed Paul Brierly to stand fire watch over the welding operations, and intentionally directed that welding commence; and (6) Paul Brierly was killed as the direct result of introducing a spark, flame or welding arc into an atmosphere charged with combustible vapors.

The District Court and the Circuit Court both characterized Ellison's conduct as reckless or wanton, but concluded that intent to injure or kill could not be inferred from the facts presented. Could not the same be said of the arsonist who lights a fire without checking for people inside

the building? Death is specifically recognized in Kentucky as a natural consequence of fire, *Reddick v. Commonwealth*, 17 Ky. Law. Rep. 1020, 33 SW 416 (1895), and an arsonist can be convicted of intentional murder.

If a jury can be allowed to infer the intent necessary to convict a person and deprive him of life or liberty, it is offensive to the sanctity of human life to impose a higher burden of proof to overcome the exclusive remedy provisions of a workers' compensation act. Certainly it is not appropriate to grant summary judgment on Ellison's subjective intent, and Petitioner submits that it is error to have done so.

CONCLUSION

The within Petition for Writ of Certiorari should be granted to address the extent to which 28 USC § 1446 provides access to federal court, and the extent to which § 1446 and § 1447 limit access to federal court in diversity cases. It should also be granted to establish the number of times state court proceedings can be interrupted by removal petitions.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 10, 1999]

No. 97-6190

JEFFREY D. BRIERLY, Administrator of the Estate of Paul Brierly,
Plaintiff-Appellant,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.; DAVID ELLISON,
Defendants-Appellees.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in all respects.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 10, 1999]

No. 97-6190

JEFFREY D. BRIERLY, Administrator of the Estate of Paul Brierly,
Plaintiff-Appellant,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.; DAVID ELLISON,
Defendants-Appellees.

Before: GUY, DAUGHTREY, and MOORE, Circuit Judges.

AMENDED OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. This diversity wrongful-death action was originally filed in state court against two defendants, only one of whom had been served when the case was removed to federal court. The

district court remanded, after finding lack of proof of complete diversity. When the case was removed a second time by the previously unserved defendant, however, the district court denied the plaintiff's renewed motion to remand, finding complete diversity and concluding that the one-year time limitation on removal of diversity cases contained in 28 U.S.C. § 1446(b) was inapplicable. On the merits, the district court then granted the defendants' motions for summary judgment, holding that the plaintiff does not meet any of the exceptions to the Kentucky Workers' Compensation Act that would permit the filing of an independent wrongful death action. Finding no error, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Paul Brierly was killed in an explosion at the Alusuisse Flexible Packaging plant on August 30, 1993. Electing to forego the decedent's statutory right to workers' compensation benefits, Brierly's estate instead filed this wrongful death action in state court, alleging that Alusuisse "deliberately intended" to kill Brierly, which, if proven, would exempt him from the exclusive remedy provisions of the Kentucky Workers' Compensation Act.

At the time of his death, Brierly was a co-op student attending Shelby County Vocational School and was working with Alusuisse under the supervision of David Ellison, among others. Alusuisse manufactures materials for packaging and labeling foods and pharmaceutical medicines. The printing press components used to produce the labels gradually develop a buildup of ink and adhesive materials, and the workers eliminate the buildup by disassembling the components and running them through a "large-parts washing

machine." The washing machine was similar to a dishwasher, but the solvent cleaning solutions used had low flash points and were highly flammable.

The parties do not disagree about the events leading up to the accident that took Brierly's life. On Friday, August 27, 1993 -- three days before the accident -- the seal on the main pump of the parts washing machine broke, allowing the flammable solvent solution to leak during operation of the machine. The employee who was operating the machine when the leak developed shut the washer down, notified Alusuisse's maintenance department, and reported the problem to his supervisor. The maintenance department made plans to remove the pump on the following Monday.

The district court found that the following precautions were taken to minimize the possibility that the removal of the pump would generate sparks and thus create a fire hazard:

> (1) the electricity to the machine was locked out and tagged out; (2) the washing machine and solvent supply reservoir were drained of solvent; (3) the pit below the washer was ventilated with a compressed air hose over the course of the entire weekend to purge any accumulated fumes from underneath the machine; (4) the washing machine door was left open Friday evening so that the interior of the machine could be aired out over the weekend; (5) and a special floor-level ventilation system was left running during the weekend to help purge the room of fumes.

Before the pump was replaced and welding begun, Alusuisse took additional safety measures: "(1) water was placed in the pit below the machine so as to prevent sparks from igniting any dried solvent residue left behind from the leaking pump; and (2) welding blankets were placed on and around the filter basket housing and parts washing machine."

Dave Ellison, Alusuisse's corporate safety director, made two trips to the parts washing room on Monday. On his second trip to the washing room, Terry Lingle, the employee responsible for overseeing operation of the parts washing room, expressed concern that about the possibility that sparks created during the welding process could ignite a fire. However, both Ellison and Gary Wordlow, the maintenance supervisor, reassured Lingle about the many precautions that had been taken. Wordlow even volunteered to do the welding himself, but maintenance lead-man Reinhold Ritzi decided that he would do the welding because he had more experience than Wordlow. Subsequently, Ellison and Wordlow gave their final approval for the welding.

Wordlow, Ellison, and Ritzi apparently believed that the parts washing room had been monitored with the "LEL" meter, a device which is used to measure the "lowest explosive limit" of solvent vapor in an area before a flammable source is introduced. In the wake of the explosion, however, it was discovered that the LEL meter had not been used. Each of the men involved stated that they had assumed that one of the others had obtained the readings.

A "fire watch" crew was assembled before Ritzi began the welding. Wordlow and other maintenance crew members -- including Brierly - stood by with fire extinguishers watching for stray sparks that could ignite a fire. Brierly, the

least experienced member of the crew, was almost 12 feet away from the welding site, further away than any of the other crew members.

As Ritzi prepared to weld the filter basket cover, a spark ignited undetected residual solvent fumes inside the parts washing machine, causing an explosion. The explosion blew off the steel door on the opposite end of the parts washing machine, and the door struck Brierly, resulting in his death. Wordlow, Ritzi, and one other worker also suffered injuries as a result of the incident.

Several state and local administrative agencies investigated the explosion, including the Kentucky Labor Cabinet, the Kentucky Fire Marshal's office, and the Environmental Protection Agency. The Kentucky Labor Cabinet issued a citation to Alusuisse and assessed a $24,500 civil penalty based on the insufficiency of the precautions taken the day of the accident and the inadequate training of some of the workers in first aid and use of fire extinguishers. The Kentucky Fire Marshal's office concluded that the explosion was accidental.

After a coroner's inquest, the coroner's jury found that Alusuisse "deliberately placed [Brierly] and other employees in a known, unsafe and hazardous position" and recommended that the case be submitted to the Shelby County grand jury. On June 20, 1994, the grand jury indicted Alusuisse for reckless homicide under KRS 507.050, a class D felony. The indictment alleged that Alusuisse "committed the offense of reckless homicide when it recklessly caused the death of Paul D. Brierly by failing to perceive the substantial and unjustifiable risk of explosion which constituted a gross

deviation from the standard of care that a reasonable person would observe in the situation as it then existed."

Brierly's administrator filed this tort action on his behalf in the Shelby County Circuit Court on May 12, 1994, naming Alusuisse and David Ellison as defendants. On June 8, 1994, within 30 days of being served with the complaint, Alusuisse removed the state court action to federal district court on the basis of diversity jurisdiction. On March 30, 1995, the district court remanded the action to the Shelby Circuit Court on Brierly's motion, because Alusuisse had failed to introduce evidence to establish complete diversity by showing that Ellison was no longer a citizen of Kentucky. Alusuisse then filed a motion to reconsider, which the district court denied, based on its conclusion that 28 U.S.C. § 1447(d) divested it from jurisdiction to consider such a motion after having remanded the case. At the same time it filed the motion to reconsider, Alusuisse also filed a second notice of removal. The district court again remanded the case, holding that the party that seeks to remove an action has the burden to present evidence of diversity in response to a motion to remand.

Ellison did not consent to either of Alusuisse's notices of removal or the motion to reconsider because he had not yet been served at the time Alusuisse filed these papers. Brierly had attempted to serve Ellison in Shelby County early in the proceedings but had been unsuccessful because Ellison had already left the state for Wisconsin. The district court noted that Brierly had obtained the new business address of Ellison from Alusuisse in August 1994, but could not effect service upon him until late October 1995 because the district court had ordered a stay of proceedings in the case until it resolved

the motion to remand. On November 10, 1995, Brierly filed an amended complaint and effected service upon Ellison. On November 30, 1995, within 30 days of being served, EIlison filed a notice of removal on the basis of diversity, and Alusuisse filed a notice of its consent to Ellison's removal on the same day. On January 30, 1996, the district court denied Brierly's motion to remand, taking judicial notice of Ellison's affidavit, in which he represented that he was a resident of Wisconsin at the time the original action was filed and thereby established complete diversity of the parties. On September 4, 1997, the district court granted Alusuisse's and Ellison's motions for summary judgment, and the plaintiff now appeals that order.

DISCUSSION

I. Jurisdiction

Brierly argues that the district court's first order of remand divested it of all jurisdiction in this case, precluding it from later deciding, in the context of a second attempt to remove, that it did, in fact, have jurisdiction to hear the case. This question is governed by 28 U.S.C. § 1447(c) and (d). Subsection (c) provides in pertinent part that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Subsection (d) precludes reviewing such remand orders, providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

Although we have not previously addressed this specific issue, the language in § 1447(d) has been universally

construed in other circuits to preclude further reconsideration or review of a district court's order remanding a case, because a remand to state court divests a district court of jurisdiction such that it may not take any further action on the case.[1]

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[1] *See, e.g., United States v. Rice*, 327 U.S. 742 (1946) (applying 28 U.S.C. § 71); *In re Lowe*, 102 F.3d 731, 735 (4th Cir. 1996) (issuing writ of mandamus instructing district court that had improperly reconsidered its previous remand order to remand case to state court and explaining "the entry of the order of remand . . . divested the district court of all jurisdiction in this case and precluded it from entertaining any further proceedings of any character. . .") (quoting *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979)); *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081-82 (3d Cir. 1992) (holding clerk's act of sending certified copy of order of remand deprived district court of jurisdiction to consider subsequent motion to file amended notice of removal); *Harris v. Blue Cross/Blue Shield of Alabama, Inc.*, 951 F.2d 325, 326-27 (11th Cir. 1992) (holding both appellate and district court precluded from reviewing district court's finding that it lacked subject matter jurisdiction); *Seedman v. U.S. Dist. Court for the Cent. Dist. Of California*, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam) (issuing writ of mandamus instructing district court to remand case to state court despite district court's conclusion that initial order was based upon clerical error); *New Orleans Pub. Ser., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986) (per curiam) (holding employer's suit seeking declaratory and injunctive relief were attempts to seek collateral review of district court's earlier remand order over which federal court had no jurisdiction; vacating district court's order and remanding for order dismissing for lack of subject matter jurisdiction); *Federal Deposit Insurance Corp. v. Santiago Plaza*, 598 F. 2d 634, 636 (1st Cir. 1979) ("[o]nce a district court has decided to remand a case and has so notified the state court, the district judge is without

We recognize, as the Fourth Circuit noted in *In re Lowe,* 102 F.3d 731, 734 (4th Cir. 1996), that there are few exceptions to the general rule that remand orders are not reviewable and that these exceptions have been narrowly crafted by Congress and the courts. In this case, however, the removal by Ellison was not the functional equivalent of a motion to review or reconsider, but an original petition by a party with standing to remove after an initial remand because of his delayed service, the delay having been caused by the district court's stay order. We conclude that it would be unfair to preclude Ellison, a later-served defendant who was not involved in the first removal attempt, from the opportunity to present evidence regarding his residence and effect removal -- with the consent of the remaining defendant, of course.

II. The 30-Day Time Limitation of 28 U.S.C. 1446(b)

Having determined that the district court had jurisdiction to consider Ellison's petition for removal, the next question we must consider is whether, in cases with multiple defendants served at different times, the last-served defendant is allowed a full 30 days after being served to remove or, instead, only has 30 days from time the first defendant is served. The question is one of first impression in this circuit

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power to take any further action."); *In re La Providencia Development Corp.*, 406 F.2d 251, 253 (lst Cir. 1969) (holding district court cannot vacate remand order once entered even if persuaded it was erroneous because "nothing could be more inclusive than the phrase 'on appeal or otherwise.'") 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 491 (3d ed. 1998).

and one that has divided our sister courts.[2] Our analysis begins with the statutory language. Under 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. . . .

The statutory language itself contemplates only one defendant and thus does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original 30-day period.

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[2] The two leading treatises also diverge in their recommendations of how to resolve this legal issue. Wright & Miller recommend permitting a later-served defendant 30 days to remove, whereas Moore's Federal Practice recommends that the 30-day time limit should begin to run from service on the first defendant. *See* 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 336-39 (3d ed. 1998); Moore's Federal Practice § 107-30[3][a] (3d ed. 1997).

Faced with slightly different factual settings, the courts have reached varying results by emphasizing the policy underlying the statute. For example, in *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986), the Fifth Circuit held that the failure of the first-served defendant to file a notice of removal within 30 days of service prevents all subsequently served defendants from later removing the action to district court unless there is evidence that the plaintiff intentionally delayed naming other defendant in a bad-faith attempt to prevent removal. *See also Getty Oil Corp. v. Insurance Co. of North America,* 841 F.2d 1254 (5th Cir. 1988); 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 337 (3d ed. 1998) (citing cases). The original defendants in *Brown* could have removed earlier in the litigation because all the requirements for the district court to exercise diversity jurisdiction had been met, but they had not done so. In holding that the subsequently added defendant could not remove to federal court, the Fifth Circuit concluded:

> The general rule has been criticized as unfair. . . [W]e do not perceive the suggested unfairness to the subsequently added defendant who is merely not granted an opportunity that might have been available to others. A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff. To permit the defendants in this case to obtain removal after they have tested state-court waters for four years would give them a

> second opportunity to forum-shop and further delay the progress of the suit. The unfairness of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.

Brown, 792 F.2d at 482.

The Fourth Circuit, by contrast, has held that "individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." *McKinney v. Board of Trustees of Maryland Community College*, 955 F.2d 924, 928 (4th Cir. 1992). In *McKinney*, the earlier-served defendants had petitioned for removal within their allotted 30 days, and the question was whether a later-served defendant could join in their removal petition after that 30-day period had elapsed. The Fourth Circuit articulated several policy considerations supporting its conclusion. First, the court stated, it did not believe Congress intended the inequity that would result from "establishing one fixed deadline for defendants served as much as thirty days apart." *Id* at 927. The court additionally noted a policy concern that was not present when *Demco* was decided by the Fifth Circuit, pointing out that in 1988, Congress amended § 1446(a) to provide that petitions for removal are now subject to Rule 11 of the Federal Rules of Civil Procedure. *See* Judicial Improvements and Access to Justice Act, Pub.L.No. 100-702, § 1016(b), 102 Stat. 4669 (1988). In light of that amendment, the court reasoned, a rule that the last-served defendant has 30 days in which to remove a case to federal court is imperative. "Otherwise, later served defendants will either have to forego removal or join

hurriedly in a petition for removal and face possible Rule 11 sanctions. *McKinney,* 955 F.2d at 928. The court also responded to the argument that plaintiffs are entitled to know early in the proceedings whether the case will be heard in state or federal court, noting that plaintiffs can ensure a quick resolution of the forum by simply "mak[ing] sure that all defendants are served at about the same time." *Id.* at 927.

The facts in this case are somewhat different than the facts before the *McKinney* court in that the earlier-served defendants in *McKinney* had a valid petition for removal pending at the time the later-served defendant joined in the removal petition, whereas the earlier-served defendant in the case at bar had failed in its attempts to remove the case when the later-served defendant filed a new removal petition. Nonetheless, we find that the policy considerations articulated by the Fourth Circuit in *McKinney* are equally applicable to the facts before this court.

Furthermore, as a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert "first" before "defendant" into the language of the statute. *See id.* We are naturally reluctant to read additional words into the statute, however. If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily so provided. For that reason, and as a matter of fairness to later-served defendants, we hold that a later-served defendant has 30 days from the date of

service to remove a case to federal district court, with the consent of the remaining defendants.[3]

III. The One-Year Limitation of 28 U.S.C. § 1446(b)

In addition to the 30-day time limitation provided by the first paragraph of 28 U.S.C. § 1446(b), set out in the

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[3] Our holding on this issue raises the question of whether Alusuisse, who had previously failed in its attempts to remove the case to district court within the 30-day time limitation, could consent to Ellison's petition to remove the case. It appears that none of our sister circuits have addressed this issue. The rule of unanimity requires that in order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal. We conclude that a first-served defendant can consent to a later-served defendant's removal petition, despite having already failed in its own efforts to remove. Given the rule of unanimity, holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify our holding that later-served defendants are entitled to 30 days to remove the case to district court. *See Freeman v. Bechtel*, 936 F. Supp. 320, 325-27 (M.D.N.C. 1996) (holding first-served defendants could consent to later-served defendant's removal despite having already waived their right to removal); *but see Holder v. City of Atlanta*, 925 F. Supp. 783, 785-86 (N.D.Ga. 1996) (holding that later-served defendants cannot obtain consent from defendants who failed to remove within their own 30-day period); *Scialo v. Scala Packing Co., Inc.*, 821 F. Supp. 1276, 1278 (N.D. Ill. 1993) (refusing to allow later-served defendants whose petition to remove had failed because of noncompliance with § 1446(b) to consent to later-served defendant's petition for removal).

preceding section of this opinion, the second paragraph of § 1446(b) provides an additional one-year time limit on removal:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

28 U.S.C. § 1446(b) (emphasis added).

"[I]n diversity actions Rule 3 [of the Federal Rules of Civil Procedure] governs the date from which various timing requirements of the Federal Rules begin to run. "*Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (footnote omitted). Thus, this action began on May 12, 1994, the date upon which Brierly filed his complaint with the court. *See* Fed. R. Civ. P. 3. Brierly contends that Ellison's removal some 18 months later violated the one-year limitation established by § 1446(b). Although this question is one of first impression in this circuit, we are guided in our inquiry by the Ninth Circuit's recent ruling on the same issue in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir.), *cert. denied*, 119 S.Ct. 407 (1998).

As framed by the court in *Ritchey,* the question is basically whether the exception stated in the second paragraph of § 1446(b) applies to the entire subsection, or only to the second paragraph, quoted above. *See Ritchey,* 139 F.3d at 1316. In interpreting the statutory language, we are mindful that the statutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941). Thus, in the interest of comity and federalism, federal jurisdiction should be exercised only when it is clearly established, and any ambiguity regarding the scope of § 1446(b) should be resolved in favor of remand to the state courts.

Nevertheless, in this case we are constrained by the plain language of the statutory provision. Based upon ordinary language usage, the qualifying clause – "except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action" -- can only be interpreted to modify the antecedent clause to which it is attached, and not previous sections of the text. If Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose. In addition, the policy discussion found within the legislative history provides support for this interpretation. *See Ritchey,* 139 F.3d at 1316-17(discussing legislative history); *see also New York Life Ins. Co. v. Deshotel,* 142 F.3d 873, 886-87 (5th Cir. 1998) (same). We hold that the one-year limitation on removal of diversity cases applies only to those that were not initially

removable and, therefore that Ellison's petition for removal was not untimely.[4]

IV. The Motion for Summary Judgment

The district court granted the defendants' motions for summary judgment on the basis of the exclusive-remedy provision of the Kentucky Workers' Compensation Act that applies to workplace injuries:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. ... .

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[4] In support of his argument that the one-year limitation applies to all diversity actions, Brierly cites the Supreme Court's recent opinion in *Caterpillar Inc. v. Lewis,* in which the Court commented that "[n]o case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year alter commencement of the action.'" 519 U.S. 61, ___, 117 S. Ct. 467, 473 (1996) (quoting 28 U.S.C. § 1441(b)). The Supreme Court, however, was not addressing the interpretation question presented here, and was speaking of actions that were not originally removable. *See* 519 U.S. at ___; 467 S. Ct. at 472-73.

Ky.Rev.Stat.Ann.§ 342.690(1) (Michie 1997). The plaintiff, however, argues that this case falls within the "deliberate intention" exception to the exclusivity of remedies established by the Act. Kentucky Revised Statute 342.610(4) provides that an employee or his dependents can file a civil action against his employer if "the injury or death results to the employee through the deliberate intention of his employer to produce such injury or death." Based on the facts in the record before us, we cannot agree.

The plaintiff contends that Alusuisse's intent to kill Brierly can be inferred from the circumstances surrounding his death. But, as the district court noted, "[t]he statutory standard . ... requires more than implied intent; it requires 'deliberate intention.'" In support of this proposition, the court cited *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955), in which the Kentucky Supreme Court held that even though an employer had known that the machine that injured his employee was dangerous and failed to warn the employee, had failed to properly maintained the machine, and hadprovided no safety devices on the machine, there was no evidence that the employer had "determined to injure the employee" as required by the phrase "deliberate intention." *Id.* at 26.

We conclude that the district court, relying on controlling state law, correctly concluded that the plaintiff's allegations are insufficient to meet the specific or deliberate intent exception to the exclusive-remedy provisions of the Kentucky Workers' Compensation Act. The defendants took many precautions, albeit clearly not enough, and placed

Brierly furthest away from the washer in the "fire watch" line. As the district court noted,

> . . . if Brierly's death was intended, an explosion such as this seems like a strange, clumsy, and umeliable way to carry it out. Significantly, it was Reinhold Ritzi, who was not in charge of the operation, that determined Brierly's position in the room at the time of the explosion. It seems far fetched that Alusuisse would decide to kill Brierly by creating a spark with a welding rod so as to set off an explosion in an adjacent machine which would then blow off a sealed 350-pound steel door that would strike and kill Brierly.

In light of the Kentucky Supreme Court precedent interpreting the phrase. "deliberate intention," we conclude that the plaintiff did not present evidence to the district court from which a reasonable jury could conclude that Alusuisse deliberately intended to cause Brierly's death. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Even if Alusuisse's actions were reckless or wanton, which may be a fair characterization, there is no indication or reasonable inference that the company intended to injure or kill Brierly. Accordingly, the Kentucky Workers' Compensation Act provides the exclusive remedy for Brierly s death.

Likewise, the Kentucky Worker's Compensation Act provides the exclusive remedy against a fellow employee whose actions cause him injury or death:

> The exemption from liability given an employer by this section shall also extend to such employer's . . . employees . . . provided the exemption from liability given an employee. . . shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee

Ky.Rev.Stat.Ann. § 342.690(1) (Michie 1997). As the district court held, the plaintiff has not alleged that Ellison intentionally and physically attacked him and, on the facts of this case, he does not fall within the statutory exception.

CONCLUSION

For the reasons set out above, we conclude that the district court had jurisdiction over this action because it was properly removed from state court by the later-served defendant, Ellison, with the consent of Alusuisse; that the removal was timely because the one-year limitation on removal does not apply in this case; and that summary, judgment was properly awarded to the defendants. We therefore **AFFIRM** the district court's judgment in all respects.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 12, 1999]

No. 97-6190

JEFFREY D. BRIERLY, Administrator of the Estate of Paul Brierly,
Plaintiff-Appellant,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.; DAVID ELLISON,
Defendants-Appellees.

Before: GUY, DAUGHTREY, and MOORE, Circuit Judges

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in all respects.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 12, 1999]

No. 97-6190

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Plaintiff-Appellant,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.; DAVID ELLISON,
Defendants-Appellees.

Before: GUY, DAUGHTREY, and MOORE, Circuit Judges.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. This diversity wrongful-death action was originally filed in state court against two defendants, only one of whom had been served when the case was removed to federal court. The

district court remanded, after finding lack of proof of complete diversity. When the case was removed a second time by the previously unserved defendant, however, the district court denied the plaintiff's renewed motion to remand, finding complete diversity and concluding that the one-year time limitation on removal of diversity cases contained in 28 U.S.C. § 1446(b) was inapplicable. On the merits, the district court then granted the defendants' motions for summary judgment, holding that the plaintiff does not meet any of the exceptions to the Kentucky Workers' Compensation Act that would permit the filing of an independent action. Finding no error, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Paul Brierly was killed in an explosion at the Alusuisse Flexible Packaging plant on August 30, 1993. Electing to forego the decedent's statutory right to workers' compensation benefits, Brierly's estate instead filed this wrongful death action in state court, alleging that Alusuisse "deliberately intended" to kill Brierly, which, if proven, would exempt him from the exclusive remedy provisions of the Kentucky Workers' Compensation Act.

At the time of his death, Brierly was a co-op student attending Shelby County Vocational School and was working with Alusuisse under the supervision of David Ellison, among others. Alusuisse manufactures materials for packaging and labeling foods and pharmaceutical medicines. The printing press components used to produce the labels gradually develop a buildup of ink and adhesive materials, and the workers eliminate the buildup by disassembling the components and running them through a "large-parts washing

machine." The washing machine was similar to a dishwasher, but the solvent cleaning solutions used had low flash points and were highly flammable.

The parties do not disagree about the events leading up to the accident that took Brierly's life. On Friday, August 27, 1993 -- three days before the accident -- the seal on the main pump of the pans washing machine broke, allowing the flammable solvent solution to leak during operation of the machine. The employee who was operating the machine when the leak developed shut the washer down, notified Alusuisse's maintenance department, and reported the problem to his supervisor. The maintenance department made plans to remove the pump on the following Monday.

The district court found that the following precautions were taken to minimize the possibility that the removal of the pump would generate sparks and thus create a fire hazard:

> (1) the electricity to the machine was locked out and tagged out; (2) the washing machine and solvent supply reservoir were drained of solvent; (3) the pit below the washer was ventilated with a compressed air hose over the course of the entire weekend to purge any accumulated fumes from underneath the machine; (4) the washing machine door was left open Friday evening so that the interior of the machine could be aired out over the weekend; (5) and a special floor-level ventilation system was left running during the weekend to help purge the room of fumes.

Before the pump was replaced and welding begun, Alusuisse took additional safety measures: "(1) water was placed in the pit below the machine so as to prevent sparks from igniting any dried solvent residue left behind from the leaking pump; and (2) welding blankets were placed on and around the filter basket housing and parts washing machine."

Dave Ellison, Alusuisse's corporate safety director, made two trips to the parts washing room on Monday. On his second trip to the washing room, Terry Lingle, the employee responsible for overseeing operation of the parts washing room, expressed concern that about the possibihty that sparks created during the welding process could ignite a fire. However, both Ellison and Gary Wordlow, the maintenance supervisor, reassured Lingle about the many precautions that had been taken. Wordlow even volunteered to do the welding himself, but maintenance lead-man Reinhold Ritzi decided that he would do the welding because he had more experience than Wordlow. Subsequently, Ellison and Wordlow gave their final approval for the welding.

Wordlow, Ellison, and Ritzi apparently believed that the parts washing room had been monitored with the "LEL" meter, a device which is used to measure the "lowest explosive limit" of solvent vapor in an area before a flammable source is introduced. In the wake of the explosion, however, it was discovered that the LEL meter had not been used. Each of the men involved stated that they had assumed that one of the others had obtained the readings.

A "fire watch" crew was assembled before Ritzi began the welding. Wordlow and other maintenance crew members including Brierly - stood by with fire extinguishers watching

for stray sparks that could ignite a fire. Brierly, the least experienced member of the crew, was almost 12 feet away from the welding site, farther away than any of the other crew members.

As Ritzi prepared to weld the filter basket cover, a spark ignited undetected residual solvent fumes inside the parts washing machine, causing an explosion. The explosion blew off the steel door on the opposite end of the parts washing machine, and the door struck Brierly, resulting in his death. Wordlow, Ritzi, and one other worker also suffered injuries as a result of the incident.

Several state and local administrative agencies investigated the explosion, including the Kentucky Labor Cabinet, the Kentucky Fire Marshal's office, and the Environmental Protection Agency. The Kentucky Labor Cabinet issued a citation to Alusuisse and assessed a $24,500 civil penalty based on the insufficiency of the precautions taken the day of the accident and the inadequate training of some of the workers in first aid and use of fire extinguishers. The Kentucky Fire Marshal's office concluded that the explosion was accidental.

After a coroner's inquest, the coroner's jury found that .Alusuisse "deliberately placed [Brierly] and other employees in a known, unsafe and hazardous position" and recommended that the case be submitted to the Shelby County grand jury. On June 20, 1994, the grand jury indicted Alusuisse for reckless homicide under KRS 507.050, a class D felony. The indictment alleged that Alusuisse "committed the offense of reckless homicide when it recklessly caused the death of Paul D. Brierly by failing to perceive the substantial

and unjustifiable risk of explosion which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation as it then existed."

Brierly's administrator filed this tort action on his behalf in the Shelby County Circuit Court on May 12, 1994, naming Alusuisse and David Ellison as defendants. On June 8, 1994, within 30 days of being served with the complaint, Alusuisse removed the state court action to federal district court on the basis of diversity jurisdiction. On March 30, 1995, the district court remanded the action to the Shelby Circuit Court on Brierly's motion, because Alusuisse had failed to introduce evidence to establish complete diversity by showing that Ellison was no longer a citizen of Kentucky. Alusuisse then filed a motion to reconsider, which the district court denied, based on its conclusion that 28 U.S.C. § 1447(d) divested it from jurisdiction to consider such a motion after having remanded the case. At the same time it filed the motion to reconsider, Alusuisse also filed a second notice of removal. The district court again remanded the case, holding that the party that seeks to remove an action has the burden to present evidence of diversity in response to a motion to remand.

Ellison did not consent to either of Alusuisse's notices of removal or the motion to reconsider because he had not yet been served at the time Alusuisse filed these papers. Brierly had attempted to serve Ellison in Shelby County early in the proceedings but had been unsuccessful because Ellison had already left the state for Wisconsin. The district court noted that Brierly had obtained the new business address of Ellison from Alusuisse in August 1994, but could not effect service upon him until late October 1995 because the district court

had ordered a stay of proceedings in the case until it resolved the motion to remand. On November 10, 1995, Brierly filed an amended complaint and effected service upon Ellison. On November 30, 1995, within 30 days of being served, Ellison fried a notice of removal on the basis of diversity, and Alusuisse flied a notice of its consent to Ellison's removal on the same day. On January 30, 1996, the district court denied Brierly's motion to remand, taking judicial notice of Ellison's affidavit, in which he represented that he was a resident of Wisconsin at the time the original action was filed and thereby established complete diversity of the parties. On September 4, 1997, the district court granted Alusuisse's and Ellison's motions for summary judgment, and the plaintiff now appeals that order.

DISCUSSION

I. Jurisdiction

Brierly argues that the district court's first order of remand divested it of all jurisdiction in this case, precluding it from later deciding, in the context of a second attempt to remove, that it did, in fact, have jurisdiction to hear the case. This question is governed by 28 U.S.C. § 1447(c) and (d). Subsection (c) provides in pertinent part that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Subsection (d) precludes reviewing such remand orders, providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

Although we have not previously addressed this specific issue, the language in § 1447(d) has been universally construed in other circuits to preclude further reconsideration or review of a district court's order remanding a case, because a remand to state court divests a district court of jurisdiction such that it may not take any further action on the case.[1]

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[1] *See, e.g., United States v. Rice,* 327 U.S. 742 (1946) (applying 28 U.S.C. § 71); *In re £owe,* 102 F.3d 731,735 (4th Cir. 1996) (issuing writ of mandamus instructing district court that had improperly reconsidered its previous remand order to remand case to state court and explaining "the entry of the order of remand. . . divested the district court of all jurisdiction in this case and precluded it from entertaining any further proceedings of any character. . .") (quoting *Three J Farms, Inc. v. Alton Box Bd Co.*, 609 F.2d 112, 115 (4th Cir. 1979)); *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081-82 (3d Cir 1992) (holding clerk's act of sending certified copy of order of remand deprived district court of jurisdiction to consider subsequent motion to file amended notice of removal); *Harris v. Blue Cross/Blue Shield of Alabama, Inc.* 951 F.2d 325, 326-27 (11th Cir. 1992) (holding both appellate and district court precluded from reviewing district court's finding that it lacked subject matter jurisdiction); *Seedman v. U.S. Dist. Court for the Cent. Dist. Of California,* 837 F.2d 413, 414 (9th Cir. 1988) (per curiam) (issuing writ of mandamus instructing district court to remand case to state court despite district court's conclusion that initial order was based upon clerical error); *New Orleans Pub. Ser., Inc. v. Majoue,* 802 F.2d 166, 167 (5th Cir. 1986) (per curiam) (holding employer's suit seeking declaratory and injunctive relief were attempts to seek collateral review of district court's earlier remand order over which federal court had no jurisdiction; vacating district court's order and remanding for order dismissing for lack of subject matter Jurisdiction); *Federal Deposit Insurance Corp. v. Santiago Plaza,* 598 F. 2d 634, 636

We recognize, as the Fourth Circuit noted in *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996), that there are few exceptions to the general rule that remand orders are not reviewable and that these exceptions have been narrowly crafted by Congress and the courts. In this case, however, the removal by Ellison was not the functional equivalent of a motion to review or reconsider, but an original petition by a party with standing to remove after an initial remand because of his delayed service, the delay having been caused by the district court's stay order. We conclude that it would be unfair to preclude Ellison, a later-served defendant who was not involved in the first removal attempt, from the opportunity to present evidence regarding his residence and effect removal -- with the consent of the remaining defendant, of course.

II. The 30-Day Time Limitation of 28 U.S.C. § 1446(b)

Having determined that the district court had jurisdiction to consider Ellison's petition for removal, the next question we must consider is whether, in cases with multiple defendants served at different times, the last-served defendant is allowed a full 30 days after being served to remove or,

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(1st Cir. 1979) ("[o]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action."); *In re La Providencia Development Corp.*, 406 F.2d 251, 253 (lst Cir. 1969) (holding district court cannot vacate remand order once entered even if persuaded it was erroneous because "nothing could be more inclusive than the phrase 'on appeal or otherwise.'") 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 491 (3d ed. 1998).

instead, only has 30 days from time the first defendant is served. The question is one of first impression in this circuit and one that has divided our sister courts.[2] Our analysis begins with the statutory language. Under 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. . . .

The statutory language itself contemplates only on defendant and thus does not answer the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original 30-day period.

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[2] The two leading treatises also diverge in their recommendations of how to resolve this legal issue. Wright & Miller recommend permitting a later-served defendant 30 days to remove, whereas Moore's Federal Practice recommends that the 30-day time limit should begin to run from service on the first defendant. *See* 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 336-39 (3d ed. 1998); Moore's Federal Practice § 107-30[3][a] (3d ed. 1997).

Faced with slightly different factual settings, the courts have reached varying results by emphasizing the policy underlying the statute. For example, in *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986), the Fifth Circuit held that the failure of the first-served defendant to file a notice of removal within 30 days of service prevents all subsequently served defendants from later removing the action to district court unless there is evidence that the plaintiff intentionally delayed naming other defendants in a bad-faith attempt to prevent removal. *See also Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988); 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 at 337 (3d ed. 1998) (citing cases). The original defendants in *Brown* could have removed earlier in the litigation because all the requirements for the district court to exercise diversity jurisdiction had been met, but they had not done so. In holding that the subsequently added defendant could not remove to federal court, the Fifth Circuit concluded:

> The general rule has been criticized as unfair. . . [W]e do not perceive the suggested unfairness to the subsequently added defendant who is merely not granted an opportunity that might have been available to others. A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff. To permit the defendants in this case to obtain removal after they have tested state-court

> waters for four years would give them a second opportunity to forum-shop and further delay the progress of the suit. The unfairness of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.

Brown, 792 F.2d at 482.

The Fourth Circuit, by contrast, has held that "individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." *McKinney v. Board of Trustees of Maryland Community College,* 955 F.2d 924, 928 (4th Cir. 1992). In *McKinney,* the earlier-served defendants had petitioned for removal within their allotted 30 days, and the question was whether a later-served defendant could join in their removal petition after that 30-day period had elapsed. The Fourth Circuit articulated several policy considerations supporting its conclusion. First, the court stated, it did not believe Congress intended the inequity that would result from "establishing one fixed deadline for defendants served as much as thirty days apart." *Id* at 927. The court additionally noted a policy concern that was not present when *Demco* was decided by the Fifth Circuit, pointing out that in 1988, Congress amended § 1446(a) to provide that petitions for removal are now subject to Rule 11 of the Federal Rules of Civil Procedure. *See* Judicial Improvements and Access to Justice Act, Pub.L.No. 100-702, § 1016(b), 102 Stat. 4669 (1988). In light of that amendment, the court reasoned, a rule that the last-served defendant has 3 0 days in which to remove a case to federal court is imperative. "Otherwise, later served

defendants will either have to forego removal or join hurriedly in a petition for removal and face possible Rule 11 sanctions." *McKinney, 955* F.2d at 928. The court also responded to the argument that plaintiffs are entitled to know early in the proceedings whether the case will be heard in state or federal court, noting that plaintiffs can ensure a quick resolution of the forum by simply "mak[ing] sure that all defendants are served at about the same time." *Id* at 927.

As a matter of policy, we find ourselves in agreement with the Fourth Circuit's analysis. Furthermore, as a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert "first" before "defendant" into the language of the statute. *See id*. We are naturally reluctant to read additional words into the statute, however. If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily so provided. For that reason, and as a matter of fairness to later-served defendants, we hold that a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.

III. The One-Year Limitation of 28 U.S. C § 1446(b)

In addition to the 30-day time limitation provided by the first paragraph of 28 U.S.C. § 1446(b), set out in the preceding section of this opinion, the second paragraph of § 1446(b) provides an additional one-year time limit on removal:

> If the case stated by the initial pleading is not removable, a notice of removal may be flied within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

28 U.S.C. § 1446(b) (emphasis added).

"[I]n diversity actions Rule 3 [of the Federal Rules of Civil Procedure] governs the date from which various timing requirements of the Federal Rules begin to run." *Walker v.Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (footnote omitted). Thus, this action began on May 12, 1994, the date upon which Brierly filed his complaint with the court. *See* Fed. R. Civ. P. 3. Brierly contends that Ellison's removal some 18 months later violated the one-year limitation established by § 1446(b). Although this question is one of the first impression in this circuit, we are guided in our inquiry by the Ninth Circuit's recent ruling on the same issue in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir.), *cert. denied*, 119 S.Ct. 407 (1998).

As framed by the court in *Ritchey,* the question is basically whether the exception stated in the second paragraph of § 1446(b) applies to the entire subsection, or only to the second paragraph, quoted above. *See Ritchey,* 139 F.3d at 1316. In interpreting the statutory language, we are mindful that the statutes conferring removal jurisdiction are to be

construed strictly because removal jurisdiction encroaches on state court's jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941). Thus, in the interest of comity and federalism, federal jurisdiction should be exercised only when it is clearly established, and any ambiguity regarding the scope of § 1446(b) should be resolved in favor of remand to the state courts.

Nevertheless, in this case we are constrained by the plain language of the statutory provision. Based upon ordinary language usage, the qualifying clause -- "except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"-- can only be interpreted to modify the antecedent clause to which it is attached, and not previous sections of the text. If Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose. In addition, the policy discussion found within the legislative history provides support for this interpretation. *See Ritchey,* 139 F.3d at 1316-17(discussing legislative history); *see also New York Life Ins. Co. v. Deshotel,* 142 F.3d 873, 886-87 (5th Cir. 1998) (same). We hold that the one-year limitation on removal of diversity cases applies only to those that were not initially removable and, therefore, that Ellison's petition for removal was not untimely.[3]

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[3] In support of his argument that the one-year limitation applies to all diversity actions, Brierly cites the Supreme Court's recent opinion in *Caterpillar Inc. v. Lewis,* in which the Court commented that "[n]o case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year

IV. The Motion for Summary Judgment

The district court granted the defendants' motions for summary judgment on the basis of the exclusive-remedy provision of the Kentucky Workers' Compensation Act that applies to workplace injuries:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

Ky.Rev.Stat.Ann.§ 342.690(1) (Michie 1997). The plaintiff, however, argues that this case falls within the "deliberate intention" exception to the exclusivity of remedies established by the Act. Kentucky Revised Statute 342.610(4) provides that an employee or his dependents can file a civil action against his employer if "the injury or death results to the employee through the deliberate intention of his employer to produce such injury or death. Based on the facts in the record before us, we cannot agree.

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after commencement of the action.'" 519 U.S. 61, ___, 117 S. Ct. 467, 473 (1996) (quoting 28 U.S.C. § 1441(b)). The Supreme Court, however, was not addressing the interpretation question presented here, and was speaking of actions that were not originally removable. *See* 519 U.S. at ___; 467 S. Ct. at 472-73.

The plaintiff, contends that Alusuisse's intent to kill Brierly can be inferred from the circumstances surrounding his death. But, as the district court noted, "[t]he statutory standard. . . requires more than implied intent; it requires deliberate intention.'" In support of this proposition, the court cited *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955), in which the Kentucky Supreme Court held that even though an employer had known that the machine that injured his employee was dangerous and failed to warn the employee, had failed to properly maintained the machine, and had provided no safety devices on t he machine, there was no evidence that the employer had determined to injure the employee" as required by the phrase "deliberate intention." *Id.* at 26.

We conclude that the district court, relying on controlling state law, correctly concluded that the plaintiff's allegations are insufficient to meet the specific or deliberate intent exception to the exclusive-remedy provisions of the Kentucky Workers' Compensation Act. The defendants took many precautions, albeit clearly not enough, and placed Brierly farthest away from the washer in the "fire watch" line. As the district court noted,

> . . . if Brierly's death was intended, an explosion such as this seems like a strange, clumsy, and unreliable way to carry it out. Significantly, it was Reinhold Ritzi, who was not in charge of the operation, that determined Brierly's position in the room at the time of the explosion. It seems far fetched that Alusuisse would decide to kill Brierly by creating a spark with a welding rod so as to set

> off an explosion in an adjacent machine which would then blow off a sealed 350-pound steel door that would strike and kill Brierly.

In light of the Kentucky Supreme Court precedent interpreting the phrase "deliberate intention," we conclude that the plaintiff did not present evidence to the district court from which a reasonable jury could conclude that Alusuisse deliberately intended to cause Brierly's death. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Even if Alusuisse's actions were reckless or wanton, which may be a fair characterization, there is no indication or reasonable inference that the company intended to injure or kill Brierly. Accordingly, the Kentucky Workers' Compensation Act provides the exclusive remedy for Brierly's death.

Likewise, the Kentucky Worker's Compensation Act provides the exclusive remedy against a fellow employee whose actions cause him injury or death:

> The exemption from liability given an employer by this section shall also extend to such employer's . . . employees . . . provided the exemption from liabilities given an employee. . . shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee

Ky.Rev.Stat.Ann.§ 342.690(1) (Michie 1997). As the district court held, the plaintiff has not alleged that Ellison intentionally and physically attacked him and, on the facts of this case, he does not fall within the statutory exception.

CONCLUSION

For the reasons set out above, we conclude that the district court had jurisdiction over this action because it was properly removed from state court by the later-served defendant, Ellison, with the consent of Alusuisse; that the removal was timely because the one-year limitation on removal does not apply in this case; and that summary judgment was properly awarded to the defendants. We therefore AFFIRM the district court's judgment in all respects.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed September 4, 1997]

No. 95-103

JEFFREY D. BRIERLY, ADMINISTRATOR of the ESTATE of PAUL BRIERLY, Deceased
Plaintiff,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC., ET AL.,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion and Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is,

DISMISSED WITH PREJUDICE and **STRICKEN FROM THE ACTIVE DOCKET**;

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT**;

(3) That all scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY**;

(4) That this Order is **FINAL AND APPEALABLE** and **THERE IS NO JUST CAUSE FOR DELAY.**

This the 4th day of September, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: 9-4-97

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed September 4, 1997]

No. 95-103

JEFFREY D. BRIERLY, ADMINISTRATOR of the ESTATE of PAUL BRIERLY, Deceased
Plaintiff,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC., ET AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

Defendants, David Ellison and Alusuisse Flexible Packaging, have moved the Court [Record Nos. 30 & 32] for judgment on the pleadings, or in the alternative, summary judgment. The plaintiff has responded [Record No. 44] with a motion to overrule the defendants' motions, to which the defendants have replied [Record Nos. 46 & 47]. This matter is now ripe for decision.

This is a wrongful death case brought by the estate of Paul Brierly. While working, Mr. Brierly was killed in an explosion at the Alusuisse Flexible Packaging, Inc., plant on August 30, 1993. Mr. Brierly's estate has elected to forego his statutory right to Workers' compensation benefits from Alusuisse and has filed suit.

Alusuisse manufactures printed flexible structures used for packaging foods and pharmaceuticals. The structures contain ink labeling which is incorporated into the material as it passes through various printing presses. Ink and adhesive buildup on the printing press components are removed by disassembling the components and running them through a large parts washing machine. The machine operates like a dishwasher but uses a solvent cleaning solution rather than soap and water. The solvents have low flash points and are highly flammable.

Three days prior to the explosion, the main pump broke down on the parts washing machine. Apparently, there was a problem at the pump seal which allowed solvent leakage while the parts washing machine was operating. Junior Stone, the third-shift parts washer who was operating the machine, notified Alusuisse's maintenance department and reported the problem to his supervisor, washroom lead man Don Busse. Later that same day, Busse was advised that maintenance was going to remove the pump on the following Monday.

Pump removal poses a potential spark hazard. Thus, the following precautions were taken: (1) the electricity to the machine was locked out and tagged out; (2) the washing machine and solvent supply reservoir were drained of solvent; (3) the pit below the washer was ventilated with a compressed

air hose over the course of the entire weekend to purge any accumulated fumes from underneath the machine; (4) the washing machine door was left open Friday evening so that the interior of the machine could be aired out over the weekend; (5) and a special floor-level ventilation system was left running during the weekend to help purge the room of fumes.

Gary Wordlow, the maintenance supervisor, decided to use this occasion to also fix a broken latching mechanism on the lid to the parts washer housing unit which had broken several weeks earlier. A specially fabricated clamp had been used as a temporary repair for the latching device for several weeks prior to the pump removal. A more permanent welded repair, however, was necessary to ensure the continued safe operation of the parts washing machine. The disabling of the washer to repair the pump, along with the other safety precautions cited above, presented an opportunity to permanently fix the filter housing. Unlike the pump, the filter housing was not removable from the parts washing machine, and hence, welding of the filter housing had to be performed in the washroom itself.

Before the welding occurred, the following additional safety measures were conducted: (1) water was placed in the pit below the machine so as to prevent sparks from igniting any dried solvent residue left behind from the leaking pump; and (2) welding blankets were placed on and around the filter basket housing and parts washing machine. Although the above precautions were taken, Alusuisse and its supervisory personnel were deficient in filling out the proper safety forms and making sure that all safeguards were in fact performed before any welding occurred.

Dave Ellison, Alusuisse's corporate safety director, was also consulted about the safety of the welding operation and made two trips to the parts washing room on Monday in order to personally observe the scene. Ellison first went to the parts washing room at the request of Gary Wordlow who sought Ellison's involvement because Ellison had been involved in two prior successful welding operations in the parts washing room.

Ellison viewed the parts washing room a second time that Monday after Terry Lingle, who was responsible for overseeing operation of the parts washing room, expressed concerned that the welding might cause a fire. At this last visit by Ellison, Ellison and Wordlow advised Lingle of the precautions that had been taken, and Wordlow commented that he was so sure that it was safe to weld that he would do it himself. Upon hearing this, maintenance lead man Reinhold Ritzi indicated that he would do the welding because he was better at it than Wordlow.

Ellison and Wordlow gave the final approval for the welding. At that time, Wordlow, Ellison, and Ritzi all believed that the air in the parts washing room had been monitored with the "LEL" meter. Alusuisse owned such a device, which is used to measure the "lowest explosive limit" of solvent vapor in an area before a flammable source is introduced. However, after the explosion, it was discovered that the LEL meter had not been used; each of the men involved had assumed one of the others had obtained the readings.

As a final precaution, it was decided that Wordlow and maintenance crew members Mike Niles and Paul Brierly

would form a "fire watch." Each member of the fire watch crew was equipped with fire extinguishers which could be used to combat stray sparks or fires. Ritzi intentionally placed Brierly, the least experienced member of the crew, farthest away from the welding site; Brierly was almost 12 feet from the welding site on the opposite end of the parts washing machine. Wordlow and Niles were standing just behind the welder, Ritzi, and were the closest members of the fire watch crew to the actual welding site.

The explosion occurred as Ritzi was preparing to weld on the filter basket cover. Apparently, a spark ignited undetected residual solvent fumes inside the parts washing machine which caused an explosion. The explosion blew off the steel door on the opposite end of the parts washing machine, and the door struck Brierly, instantly killing him. Wordlow, Niles, and Ritzi suffered injuries as a result of the incident.

A number of state and local administrative agencies investigated the explosion, including: the Kentucky Labor Cabinet, the Kentucky Fire Marshal's office, and the Environmental Protection Agency. Alusuisse was cited by the Kentucky Labor Cabinet and was assessed a $24,500 civil penalty. The penalty was based on the fact that all appropriate precautions had not been taken, and some of the men were not properly trained in first aid and the use of fire extinguishers.

Assistant State Fire Marshal, Rodney Raby, concluded that the explosion was accidental. Neither Raby nor anyone on his investigative team found any evidence to suggest that Alusuisse somehow intended the explosion or Brierly's death.

A coroner's inquest was also conducted following the explosion. The coroner's jury found that the explosion and Brierly's death were accidental. The coroner's jury also concluded that Alusuisse "deliberately placed the deceased (Brierly) and other employees in a known, unsafe and hazardous position" and recommended that the case be submitted to the Shelby County grand jury.

On June 20, 1994, Alusuisse was indicted for reckless homicide under KRS 507.050, a Class D felony. The indictment stated that Alusuisse "recklessly caused the death of Paul D. Brierly by failing to perceive the substantial and unjustifiable risk of explosion which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation as it then existed."

The first issue the Court must address is whether the Kentucky Workers' Compensation Act is Mr. Brierly's exclusive remedy. The Act was enacted in order to replace common law rights with broader remedies and more certain recovery for workplace injuries regardless of negligence on the part of an employer. Morrison v. Carbide and Carbon Chemicals Corp., 129 S.W.2d 547, 549 (Ky. 1939). The Act is social legislation which represents a compromise between the rights of employers and employees in order to avoid the expense, delay, and uncertainty of actions at law. Id. at 549. Under the Act, liability is not dependent upon negligence or tortious conduct, nor is it diminished by contributory negligence or assumed risk. An employer, however blameless he or she may be, is liable to an employee for injuries or death arising out of the employment. In return, employees are barred from pursuing common law actions for unlimited

damages against their employers. This legislative quid pro quo underpins the Act. Id.

The exclusive remedy provision of Kentucky's Act is set forth in KRS 342.690(1):

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability to such employee. . . and anyone otherwise entitled to recover damages from such employer. . . on account of such injury or death.

By its plain terms, KRS 342.690(1) bars tort actions against employers for work-related injuries. It is undisputed that Brierly was an Alusuisse employee and was acting within the scope of his employment at the time of the explosion; hence, the Act is applicable.

The plaintiff, however, argues that this case falls within the exclusive remedy exception Common sense dictated the inclusion of a "deliberate intention" exception to the exclusivity of remedies established by the Act. In KRS 342.610(4), an employee or his dependents can file a civil action against his employer if "the injury or death results to the employee through the deliberate intention of his employer to produce such injury or death." Without this exception, employers could assault or even murder their employees and only be liable for compensation benefits. The statutory standard, however, requires more than implied intent; it requires "deliberate intention."

The case of Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25, 27 (Ky. 1955), interpreted the "deliberate intention" exception to require a specific intent to injure. Id. at 27. The plaintiff in that case severely cut his hand and arm while working on a machine: (1) that was not properly maintained by the employer; (2) that had no apparent safety devices for protection of the operator; (3) that the employer knew was dangerous; and (4) that the employer never gave any warnings about its condition. Id. at 26. Nevertheless, Kentucky's highest court dismissed the employee's complaint, noting that there was no evidence that the employer had set out to specifically injure or harm the plaintiff.

> The meaning expressed in the complaint is not that the machine was operated by defendant with a deliberate intention to injure plaintiff. On the contrary, plaintiff alleged specified acts which he concluded showed a 'deliberate intention' to injure him. Clearly, the allegations are that the deliberate intention to injure arose from the specified acts or omissions set forth. The complaint is devoid of any charge that defendant determined to injure plaintiff. The phrase 'deliberate intention' implies that the employer must have determined to injure the employee. We are, therefore, of the view that the allegations of the complaint are insufficient to bring the claim within the exclusion. . . Id.

The case of McCray v. Davis H. Elliot Company, 419 S.W.2d 542 (Ky. 1967), is also relevant to the issue at hand. In McCray, the plaintiff made the following allegations:

> 'the defendant, Davis H. Elliot Company, acting by and through its agents, servants and employees, did intentionally direct and order and command the decedent, Rex Devere McCray, to work on a tall pole in such an extremely dangerous and hazardous place in close proimity (sic) to a highly charged wire carrying many thousands of volts of electricity, well knowing at the time that the said Rex Devere McCray was an apprentice electrician and did not have the experience necessary to appreciate the danger and risk to his person in working in such an extra-hazardous position, and did fail to equip him with the proper equipment to handle and kill the live wires with which he was working. By said acts the defendants did deliberately intend to cause the decedent to come in contact with a highly charged wire, from which contact the decedent was electrocuted and did die of said electrical burns and shock. . .' Id. at 543-44.

The court held that wanton and gross negligence was not enough to constitute "deliberate intention" as used in the Act. Id.

In the case at bar, the plaintiff alleges that the defendants deliberately and intentionally placed Mr. Brierly in a known, unsafe, and hazardous position without taking any precautions and with the knowledge that the welding operation could cause injury or death. Relying on the reasoning of Fryman and McCray, the Court holds that Mr. Brierly's allegations are insufficient to meet the specific or deliberate

intent exception and does not constitute an action at law given the exclusive remedy of the Kentucky Workers' Compensation Act. Based on the undisputed facts, the Court finds that the explosion was nothing more than a tragic workplace accident. The Court recognizes that Alusuisse and its supervisory personnel made some huge mistakes in conducting the welding, such as Ellison's apparent approval of the operation without guaranteeing that the room had been checked with the LEL meter. In fact, it is not a stretch to describe Alusuisse's conduct, in leaving out certain procedures and not taking all precautions, as reckless or wanton. However, even if all the allegations of negligence and sloppiness are true, this still does not add up to a specific intent on behalf of Alusuisse to hurt or kill Mr. Brierly. The Court notes the following relevant facts.

First, Alusuisse did take some steps to ensure that the welding was done safely and without any injuries. Second, even the individuals who had reservations about proceeding with the welding did not anticipate an explosion. For instance, Terry Lingle stated that fire was his only concern, and from the standpoint of fire, Brierly was placed in the safest location of all. Third and most significantly, the individuals responsible for the welding were either in the room or immediately outside it when the explosion occurred. The Maintenance Supervisor, Gary Wordlow, elected to weld while the parts washing machine was down for service. He remained in the room as part of the fire watch crew when the welding commenced and was within a few feet of where the welding was to occur - much closer than Brierly. Plant Safety Director, Dave Ellison, was just outside the door to the parts washing room at the time of the explosion. Surely these gentlemen would have been out of the plant long before the

welding started had they planned or even anticipated the possibility of an explosion.

As Gary Wordlow explained:

> [I]f there was a situation where we felt there was going to be an explosion because, you know, the job didn't pressure us to go do any work like that at no given time. Surely I know my life -- and I think I speak for everybody -- is more important than the job and had I suspected or any of them really suspected that there could have been an explosion more than a fire that this work would never have been done.

Likewise, the fire marshal in charge of the investigation concluded that the explosion was accidental and did not find any evidence that Alusuisse somehow intended the explosion or Brierly's death.

Lastly, if Brierly's death was intended, an explosion such as this seems like a strange, clumsy, and unreliable way to carry it out. Significantly, it was Reinhold Ritzi, who was not in charge of the operation, that determined Brierly's position in the room at the time of the explosion. It seems far fetched that Alusuisse would decide to kill Brierly by creating a spark with a welding rod so as to set off an explosion in an adjacent machine which would then blow off a sealed 350-pound steel door that would strike and kill Brierly.

The plaintiff argues that the coroner's jury found that Alusuisse "deliberately placed the deceased (Brierly) and

other employees in a known unsafe and hazardous position." However, the coroner's jury did not conclude that the alleged deliberate placement was carried out with the intent to harm Brierly or the other employees. KRS 342.610(4).

It is also argued that since Alusuisse was indicted for reckless homicide under KRS 507.050, a Class D felony, that this is proof that Alusuisse deliberately intended to cause Brierly's death. The indictment, however, states that Alusuisse "recklessly caused the death of Paul D. Brierly by failing to perceive the substantial and unjustifiable risk of explosion which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation as it then existed." Assuming what the indictment says is true, these allegations are still insufficient as a matter of law to constitute "deliberate intention" as defined in the Act. McCray, 419 S.W.2d at 543-44 (holding that wanton and gross negligence is not sufficient to constitute deliberate intention); see Robinson v. Commonwealth, 569 S.W.2d 183, 185 (Ky. App. 1978) (noting that the reckless homicide statute does not require a specific intent that a particular act or omission cause injury).

The Court also notes that the plaintiff failed to distinguish the case at bar from Fryman and McCray, and explain why the result in the case at bar should be any different from the results in Fryman and McCray. Like in Fryman and McCray,[4] the plaintiff presents no evidence that

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[4] It should be noted that the plaintiff admits that Fryman and McCray are Kentucky's leading cases on the issue of "deliberate intent." However, the plaintiff fails to address the facts

Alusuisse deliberately intended to cause the explosion or kill Mr. Brierly. Specific intent can not be inferred from conduct that at its worst would be considered wanton or reckless. Therefore, the Court will grant Alusuisse's motion for summary judgment.

The next issue before the Court is whether the Act prevents the plaintiff from recovering from David Ellison, Alusuisse's Safety Director. The plaintiff alleges that Ellison "knew immediately prior to the explosion that [his] intended course of action created a known, unsafe and hazardous work environment which could or would result in serious bodily injury or death to. . . Paul Brierly, yet deliberately placed [Brierly] in a position of imminent peril." It is alleged that Ellison "failed and refused to take even the minimum safety precautions required by local, state, and/or federal law, and took affirmative and intentional actions in violation of such laws, all of which caused and brought about the death of [Brierly]. It is also alleged that Briery's death "resulted from the deliberate, wilful and unprovoked intention of. . . Ellison. . . to produce serious injury or death as contemplated by KRS 342.610(4), and/or KRS 342.690(1) such that the prosecution of this action is without the restrictions of KRS Chapter 342," and that Ellison's "intentional conduct was undertaken with a deliberate and flagrant indifference to the rights of [Brierly] and with a subjective awareness that such intentional conduct would result in bodily harm or death to [Brierly]."

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of either case.

The plaintiff argues that he should be allowed to sue Mr. Ellison because this action falls within an exception to the exclusive remedy provision in the Act. The plaintiff first contends the exception in KRS 342.610(4) applies. The Court has already discussed this provision as to Alusuisse. As to Mr. Ellison, this section does not even apply. Section 342.610(4) gives a cause of action, outside of the Act, against an employer who deliberately intends to cause and does cause his employee to suffer injury or death. There is nothing in KRS 342.610(4) that mentions an exception which would allow a civil cause of action against an employee. Although Mr. Ellison might have held a higher position than Mr. Brierly at the Alusuisse plant, it is obvious that both were employees of Alusuisse. It should be noted that even if KRS 342.610(4) could be stretched so far as to include Mr. Ellison, the same analysis would apply as in the Alusuisse discussion. The plaintiff has presented no facts or evidence which would allow a finding that Mr. Ellison specifically intended to harm or kill Mr. Brierly.

The plaintiff also argues that he should be allowed to sue because he falls within the KRS 342.690(1) exception. KRS 342.690(1) states that:

> The exemption from liability given an employer by this section shall also extend to such employer's. . . employees. . . provided the exemption from liability given an employee shall not apply in any case where the injury or death is proximately caused by the wilful and unprovoked Physical aggression of such employee. . . (emphasis added).

With this exception, the Kentucky legislature intended to remove the exclusivity protection from an employee who intentionally and physically attacks another employee without provocation. See Russell v. Able, 931 S.W.2d 460 (Ky. App. 1996). In the case at bar, the plaintiff has not alleged that Mr. Ellison intentionally and physically attacked him. Thus, the Court grants Mr. Ellison's motion for summary judgment.

Accordingly,

IT IS ORDERED:

(1) That Alusuisse's motion [Record No. 32] be, and the same hereby is, **GRANTED**.

(2) That David Ellison's motion [Record No. 30] be, and the same hereby is, **GRANTED**.

(3) That the plaintiff's motion [Record No. 44], be and the same hereby is, **DENIED**.

(4) That this matter be, and the same hereby is, **DISMISSED WITH PREJUDICE** and **STRICKEN FROM THE ACTIVE DOCKET**.

This the 4th day of September, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed January 30, 1996]

No. 95-103

JEFFREY D. BRIERLY, ADMINISTRATOR of the ESTATE of PAUL BRIERLY, Deceased	)
Plaintiff,	)
v.	)
ALUSUISSE FLEXIBLE PACKAGING, INC., ET AL.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon a motion to remand filed by the plaintiff Jeffrey D. Brierly, Administrator of the Estate of Paul Brierly, (Brierly) [Record No. 6] and a motion for attorneys' fees, costs and sanctions pursuant to Fed. R. Civ. P. 11 filed by plaintiff's counsel pro se [Record No. 5].

This matter has been fully briefed and, therefore, is ripe for consideration.

FACTUAL AND PROCEDURAL BACKGROUND

In order to properly address the issues before the Court, both the factual and procedural history of this matter must be set forth in some detail. This action is brought on behalf of Paul Brierly (Brierly) a co-op student who attended Shelby County Vocational School and was working with Alusuisse Packaging, Inc. (Alusuisse) under the supervision of David Ellison (Ellison) among others. Apparently, Brierly and other employees did some welding in an area which Brierly claims was not properly ventilated of combustible cleaning solvents. On August 30, 1993, an explosion at the Alusuisse facility in this area resulted in the death of Brierly and others.

On Brierly's behalf, his administrator filed an action in the Shelby County Circuit Court on May 12, 1994. He now proceeds on a two count amended complaint alleging (1) that the defendants intentionally placed Brierly in a situation posing a serious risk of injury or death; and (2) that the "flash fire" causing the explosion had occurred before and yet the defendants had failed to report those occurrences or otherwise comply with statutory safety requirements.

Turning back to the events of 1994, the first of several trips between state and federal court began. On June 8, 1994, Alusuisse removed the Shelby Circuit Court action to federal district court within 30 days of the filing of the complaint. This Court then granted Brierly's motion to remand on the basis that Alusuisse had utterly failed to introduce any

evidence whatsoever to establish that Ellison was present in a new state of domicile and intended to remain there. The matter was thus remanded to the Shelby Circuit Court on March 30, 1995.

Subsequent to the decision of this Court, Alusuisse pursued two tacks in an attempt to remain in federal court. First, Alusuisse filed a motion to reconsider. Having remanded the action and therefore being without jurisdiction to consider such a motion, the Court denied the motion to reconsider. 28 U.S.C. § 1447(d).

Second, Alusuisse filed another notice of removal. Again, this Court remanded holding that where a party seeks to remove an action that party has an obligation to put on evidence concerning diversity at the time of removal in response to a motion to remand. A second bite at the apple by attempting to fulfill such obligation by way of a second notice of removal is improper. In addition, the Court declined to address the merits of the motion for attorneys' fees.

Upon remand, Brierly filed an amended complaint and effected service upon Ellison. Although Ellison had been named as a party defendant in the complaint, a first attempt to serve him in Shelby County was unsuccessful due to the fact that he had already left the state for Wisconsin. As a result, Ellison did not participate in these first two runs to federal court and back.

The record reveals that in August of 1994 Brierly obtained the new business address of Ellison from Alusuisse but due to the Order of this Court staying further proceedings

in the case until the motion to remand had been resolved, Brierly was unable to serve Ellison until some time after knowing of the new address. In fact, although Brierly knew of Ellison's new address in August 1994, service could not have been effected until late October 1995 due to the stay.[1]

Within 30 days of being served, Brierly filed the notice of removal which now brings this action before the Court for the third time. As mentioned above, Ellison's codefendants consent to this removal.

The Court now has jurisdiction over this matter upon the notice of removal filed by Ellison [Record No. 1] wiith the consent of the other corporate defendants [Record No. 2]. Removal jurisdiction is predicated on diversity under 28 U.S.C. 1332.

Brierly, the plaintiff's decedent, was a resident of Kentucky and therefore for diversity purposes the plaintiff is a resident of Kentucky. All the corporate defendants are residents of states other than Kentucky. Thus the existence of diversity of citizenship turns on the citizenship of Ellison. Ellison now claims that he was a resident of Wisconsin at the time the original action was filed in Shelby Circuit Court and at the time of removal. Further, Ellison has asked the Court to take judicial notice of his affidavit [Record Nos. 7, 8]

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[1] The Court finds no basis for the suggestion, if any, that Brierly's counsel structured service of Ellison so as to defeat removal. Delay in service was necessary to comply with the Order to stay.

which would essentially establish his claim of citizenship as true.

DISCUSSION

Before addressing the substantive question of whether remand is in order, the Court must first determine whether, given the posture of this action, there are any procedural problems which preclude removal.

A. Procedural Bars to Removal

Brierly argues two procedural points in support of his contention that the instant removal is impermissible. First, Brierly contends that the one-year limitation set out in 28 U.S.C. § 1446(b) prevents Ellison from removing. Second, Brierly maintains that Alusuisse cannot consent to this removal due to the rule of unanimity.

1. The One-year Limitation of 28 U.S.C. § 1446(b)

The procedure for removal is set forth in 28 U.S.C. § 1446. Two time limits obtain. First, the defendant must file a notice of removal within the shorter of 30 days of receipt of the initial pleading which sets forth the claim or 30 days of service of summons if the initial pleading has been filed and is not required to be served on the defendant. § 1446(b). There is no question here that Ellison did in fact meet this requirement.

The second paragraph of § 1446(b) sets forth an additional time limit which applies where although the matter is not removable based on the initial pleadings, something

occurs causing the matter to become removable. This second paragraph provides:

> If the case stated by the initial pleadings is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). The last sentence of this paragraph has caused some confusion as to whether this one-year limitation applies only to the type of cases referred to in the previous sentence or to all civil actions.

Brierly's reliance on Norman v. Sundance Spas, Inc., 844 F. Supp. 355 (W.D. Ky. 1994), is misplaced if in fact the one-year limitation is meant only to apply to actions not removable based on the initial pleadings. Norman involved a situation in which dismissal of certain non-diverse parties created diversity jurisdiction. As such a situation falls squarely within the second paragraph of § 1446(b), the court there held that the one-year limitation applied and barred removal.

In the matter at hand, however, there is no event which subsequently created diversity where it did not exist before. That is, there is no "amended pleading, motion,

order, or other paper" which rendered the case removable. Thus, only if the one-year limitation is construed to apply to all civil actions including the action at hand would the limitation bar Ellison's notice of removal. Because Norman itself involved the special category of cases (not initially removable but subsequently become so), it necessarily did not resolve this issue.[2]

Upon a careful reading of the statute, the Court concludes that the plain meaning of § 1446(b) precludes a construction of this limitation as applying to all civil actions. Placement of the "except that. . ." clause in the same paragraph as and directly modifying the language dealing with those cases that become removable does not allow for a reasonable reading of the limitation to apply to all cases. Zogbi v. Federated Dept. Store, 767 F. Supp. 1037, 1039 (C.D. Cal. 1991). The amended complaint did not change the action's removability. Ellison had always been a party though not served. Based on the affidavit Ellison submitted it appears this action was initially removable. Therefore, the one-year limitation of the second paragraph of § 1446(b) does not apply to the matter at hand and does not bar Ellison from filing a notice of removal.

2. Consent to Removal

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[2] Brierly also cites Glaser v. Caterpillar Industrial, Inc., 718 F. Supp. 1317 (E.D. Mich. 1989), in support of the one-year limitation argument. Glaser involved a situation in which nondiverse defendants were dismissed leaving complete diversity. Because the order dismissing those defendants was a "motion, order or other paper" which rendered the case removable, the one-year limitation clearly applied. Such is not the case here.

As an alternative to the one-year limitation, Brierly argues that because the other defendants were unsuccessful in effecting removal within 30 days, they are unable to consent to removal by Ellison. In support of this argument Brierly cites D. Kirschner & Sons, Inc. v. Continental Cas. Co., 805 F. Supp. 479 (E.D. Ky. 1992).

In Kirschner the original defendant chose not to remove within the statutory period. Thereafter, the plaintiff filed an amended complaint adding an additional defendant. The court held that the original defendant had waived its right to removal and so could not consent to removal by the added defendant. Without such consent, the rule of unanimity which provides that "all defendants who may properly join in the removal petition must join" prevented removal by the added defendant.

Significant to the Kirschner court's holding was the fact that the added defendant and the original defendant were "closely related." In fact, the added defendant was a part of the initial defendant. The Kirschner court did, however, suggest that the same rule would be applicable where such a close association did not exist. Kirschner, 805 F. Supp. at 481.

This Court does not view the principles set forth in Kirschner to be applicable to the case at hand. It cannot be said that the initial defendants "abstain[ed] from seeking removal or [did] not effect a timely removal." Kirschner, 805 F. Supp. at 481. In fact, Alusuisse filed a timely notice of removal on two separate occasions and improvidently sought reconsideration of the remand Order. The fact that the matter was remanded each time is of no import to the issue of waiver which seems to be at the heart of Kirschner. If the initial

defendant declines to remove within the 30 day period, then that defendant has effectively waived the right of removal and may not later change position and seek to consent to a later added defendant's notice of removal.[3]

Zealous pursuit of removal is clearly at odds with waiver of the right to remove. The premise for the view that the initial defendant may not later consent is as follows: the initial defendant's conduct indicates that no consent would have been forthcoming if the added defendant had been, served simultaneously. Garside by Garside v. OSCO Drug Inc., 702 F. Supp. 19, 21 (D. Mass. 1988). In the matter at hand, every indication is to the contrary. Therefore, Alusuisse has not waived its right to removal and may now consent to Ellison's notice of removal.

B. The Substantive Question of Diversity

The earlier attempt by Alusuisse to remove failed due to the fact that Alusuisse did not set forth any evidence indicating that Ellison had changed his domicile from Kentucky to Wisconsin. Ellison has now entered an affidavit which satisfies this Court that he has in fact changed his domicile to Wisconsin.

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[3] The court in Krischner held that as nothing occurred which rendered the action removable (thereby activating the second paragraph of § 1446(b)), the 30 day limitation in the first paragraph of § 1446(b) rendered the action unremovable ". . . because the original Defendant had waived its right to remove and could not join the Notice of Removal." Kirschner, 805 F Supp. at 481 (emphasis added).

In opposition, Brierly maintains that the principles of res judicata preclude Ellison from relitigating this issue. By res judicata (claim preclusion) the Court understands Brierly to be invoking the doctrine of collateral estoppel sometimes referred to as issue preclusion. Res judicata is distinct from collateral estoppel. Collateral estoppel "preclude[s] relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action." Sanders Confectionery Products v. Heller Financial, 973 F.2d 474, 480 (6th Cir. 1992) (citations omitted).

Collateral estoppel is inapplicable for at least two reasons. First, Ellison was not technically a party to the earlier proceedings concerning removal because he had not yet been served. Because Ellison had not been served, he had no duty to consent to the removal[4] nor is it clear that he was aware of the action. Thus, Ellison was not really a party to the prior determination. Second, the issue of Ellison's state of citizenship was not actually or necessarily decided. Peabody Coal Company v. Erwin, 326 F.Supp. 1005, 1007 (W.D. Ky. 1971). The earlier remand was premised on the failure of Alusuisse to meet its burden of establishing complete diversity. Based on the unsupported conflicting representations as to the citizenship of Ellison, the Court was unable to make the necessary determination.

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[4] The rule of unanimity requires those defendants who have been served to consent to removal.

As a consequence, Ellison is not collaterally estopped from introducing evidence as to his state of domicile. Based on the affidavits submitted, the Court finds that Ellison was a citizen of Wisconsin at the time this action was filed and at the time of removal. Complete diversity exists and, therefore, the motion to remand must be denied,

Accordingly,

IT IS ORDERED HEREIN:

(1) That the motion of Jeffrey D. Brierly to set this motion for oral argument [Record No. 12] be, and the same hereby is, **DENIED** as the Court does not believe oral argument would be helpful to this determination.

(2) That the motion of David Ellison asking the Court to take judicial notice of the affidavit he submitted [Record No. 7] be, and the same hereby is, **GRANTED**; the Court hereby takes judicial notice of such affidavit [Record No. 8].

(3) That the motion to remand [Record No. 6] be, and the same hereby is, **DENIED**;

(4) That the motion of Fred Fischer pro se for sanctions and attorneys' fees and costs occasioned by removal [Record No. 5] be, and the same hereby is, **DENIED**.

This the 30th day of January, 1996.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed October 18, 1995]

No. 95-34

JEFFREY D. BRIERLY, Administrator of the Estate of PAUL BRIERLY, Deceased,
Plaintiff,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC., ET AL.,
Defendants.

ORDER

The plaintiff, by and through counsel, having moved to remand the above-styled action to the Shelby Circuit Court [Record No. 3], and the being fully briefed, this matter is ripe for decision.

FACTUAL BACKGROUND.

In May 12, 1994, the plaintiff filed this action in the Shelby Circuit Court. The case was subsequently removed to this Court on the basis of diversity jurisdiction and was styled as Frankfort Civil Action No. 94-55 [94-55]. It was remanded to the Shelby Circuit Court by order of this Court dated March 30, 1995. On April 7, 1995, Alusuisse Flexible Packaging, Inc. [Alusuisse] filed a motion to reconsider the order remanding the action and filed a second petition for removal. This Court denied Alusuisse's motion to reconsider.

In August, 1994, Charles Michael Nilles filed an action against the instant defendants alleging the same facts which served as the basis for the action in 94-55. Alleging diversity jurisdiction, the defendants subsequently removed the Nilles action and the case was styled Frankfort Civil Action No. 94-72. [94-72]. On December 7, 1994, this Court held that the defendant David Ellison [Ellison] was a domiciliary of Wisconsin at the time of the commencement of the action and at the time of removal.

The question before the Court in both 94-55 and 94-72 was whether the defendant Ellison was a citizen of Kentucky for the purposes of diversity jurisdiction. It was, and continues to be, undisputed that the plaintiff is a citizen of Kentucky and that the defendant Alusuisse is a citizen of Illinois.

On review of the records in 94-55 and 94-72, it is clear that the facts before the court regarding Ellison's domicile were different in each case. In 94-55 Alusuisse argued: (1) that the citizenship of an unserved defendant may

be ignored for the purposes of diversity, (2) that Ellison did not have to join the petition for removal because service had not been effected upon him and (3) that a filing defect did not mandate remand. Alusuisse did not offer any proof of Ellison's citizenship. As noted, 94-55 was filed in the circuit court in May, 1995, and remanded by order of this Court in March, 1995.

The record before the Court in 94-72 shows that Ellison accepted employment with American National Can in April of 1994. He began working for the company May 9, 1994. Although he had not been able to make living arrangements for his family prior to his moving, he and his wife contracted to have a home built in Appleton Wisconsin in August of 1994. Relying upon the definition of "domicile" used by the courts of Kentucky and Wisconsin, this Court determined the Ellison had moved to Wisconsin with the clear intent of residing there permanently.

Alusuisse never sought to supplement the record in 94-55 with any new evidence of Ellison's domicile. Thus, the Court could do nothing more than decide the issue of diversity upon the record before it. Moreover, Alusuisse erroneously contends that, in addressing 94-72, this Court determined that Ellison was a domiciliary of Wisconsin as of May 9, 1994. The Court merely noted that Ellison began working for American National Can in May 9, 1995. Such fact was not determinative to the finding of diversity jurisdiction in that case.

DISCUSSION

The narrow issue before the Court is whether an action, once remanded for lack of jurisdiction, may be "re-removed" where the possible basis for jurisdiction was created during the pendency of the initial motion to remand. The plaintiff argues that the defendant is merely seeking a reconsideration of this Court's order dated March 30, 1995. Alusuisse claims that this Court's order dated December 7, 1994 was a "subsequent event" upon which removal may be allowed.

Alusuisse argues that the instant removal is not based upon the same grounds as the first removal petition. In support of its position, Alusuisse relies upon the decisions in Kirkbride v. Continental Cas. Co., 933 F.2d 729 (9th Cir. 1991) and Doe v. American Red Cross, 14 F.3d 196 (3rd Cir. 1993).[1] These cases, however, are distinguishable from the instant action.

Clearly where Congress creates a new basis for federal jurisdiction, an action may be removed upon that jurisdictional source even where the action had been

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[1] The Court in Kirkbride held that a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal. The court in Doe held that the defendant had not removed on the same grounds the second time as the United States Supreme Court had determined that the defendant's charter provided a basis for removal. The court reasoned that the Supreme Court's holding provided a "new and definitive source" for the second removal petition. Id. at 200.

previously removed upon another source, and later remanded. Such was the situation before the court in Kirkbride. The court in Doe faced a very similar situation. The Supreme Court held that the Red Cross' charter provided a basis for federal jurisdiction. Thus, a jurisdictional source was created where such basis was not present at the time the lower court considered the initial removal.

The Sixth Circuit Court of Appeals has determined that a defendant desiring to remove a case has the burden of proving the diversity jurisdiction requirement. Gafford v. General Electric Co., 997 F.2d 150, 155 (6th Cir. 1993). Moreover, 28 U.S.C. S 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or other wise, of a copy of the initial pleading setting forth the claim for relief upon which such action is based, or within thirty days after the service of summons upon the defendant of such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable, except that a case may not

> be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action. (emphasis added).

The statute clearly requires that a party remove an action within thirty days of the receipt of information which would serve as the basis for removal. A violation of this timeliness requirement serves as an absolute bar to removal. See, McCraw v. Lyons, 863 F.Supp. 430, 434 (W.D.Ky. 1994). In light of the clear meaning of this statute, it cannot be said that where a defendant becomes aware of the basis for removability during the pendency of a motion to remand, that party has no obligation to so inform the Court.

Ellison moved to Wisconsin during the pendency of the motion to remand in 94-55. He contracted to build a home in Wisconsin almost seven months before this Court granted the plaintiff's motion to remand. As previously noted, Alusuisse chose not to submit this evidence to the court. Instead, Alusuisse waited until this Court remanded 94-55, only to "re-remove" based upon facts of which it had knowledge months earlier.

Thus, this Court's order may not be considered a "subsequent event". The "subsequent event" occurred at least four months prior to this Court's order dated December 7, 1994, i.e. the change in Ellison's domicile. Alusuisse had the burden of showing complete diversity in 94-55 and therefore the responsibility to supplement the record with facts which would, provide a basis for this Court's jurisdiction. Thus, unlike the facts before the courts in Kirkbride and Doe, the jurisdictional basis for removability in

the instant action did not occur as a result of a subsequent event, but was created before the Court ruled on the plaintiff's first motion to remand.

A party cannot allow its opportunity to invoke federal jurisdiction to pass where it was in possession of facts which revealed the diversity of the parties. To allow such a method of removal would be to open an avenue allowing a defendant to keep litigation at bay, possibly for years.

Accordingly,

IT IS ORDERED HEREIN,

(1) That the plaintiff's motion to remand [Record No. be, and the same hereby **GRANTED**,

(2) That the above-styled action be, and the same hereby is, **REMANDED** to the Shelby Circuit Court.

This the 18th day of October, 1995.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed July 17, 1995]

No. 95-55

JEFFREY D. BRIERLY, Administrator of the Estate of Paul Brierly, Deceased,
Plaintiff,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC., and DAVID ELLISON,
Defendants.

ORDER

This matter is before the Court upon motion of the defendant, Alusuisse Flexible Packaging, Inc. [Alusuisse] to reconsider [Record No. 15]. The motion has been fully briefed and is ripe for decision.

By Order dated March 30, 1995, the undersigned granted the plaintiff's motion to remand this action to Shelby

Circuit Court upon finding that the defendant had failed to establish diversity jurisdiction. The Court found that Alusuisse did not establish that the defendant David Ellison was a citizen of Wisconsin. Alusuisse filed the instant motion to reconsider alleging that in a related case, Charles M. Nilles v. Alusuisse Flexible Packaging Inc., Frankfort Civil Action No. 94-72, the undersigned had already determined that Ellison was a citizen of Wisconsin for diversity purposes in that action.

The plaintiff argues the defendant's motion to reconsider should be overruled because 28 U.S.C. § 1447 precludes review. The statute provides:

> Procedure after removal generally. . . (d) An order remanding a case to the State Court from which it was removed is not removable on appeal or otherwise, except that an order remanding a case to the State Court from which it was removed pursuant to section 1443 of this title shall be removable by appeal or otherwise.

Several circuits have held that § 1447(d) not only precludes appeal of a remand order by the court of appeals, but also precludes reconsideration by the district court. In New Orleans Public Service, Inc. v. Majoue, 802 F.2d 166 (5th Cir. 1986), the Fifth Circuit considered this same issue:

> It is beyond cavil, and [the plaintiff] concedes, that district court's order remanding a cause to state court may not be appealed, if

> erroneous. 28 U.S.C. 1447(d) [footnote and citations omitted].
>
> Not only may the order not be appealed but the district court itself is divested of jurisdiction to reconsider the matter. Thus, even if it later decides the order was erroneous, a remand order cannot be vacated even by the district court. See e.g. Browning v. Navarro, 743 F.2d 10069, 1078 (5th Cir. 1984); Pelleport Investors, Inc. v. Budco Quality Theatres, 741F.2d 273, 279 n.3 (9th Cir. 1984); Three J Farms, Inc. v. Alton Box Board Co., 609 F.2d 112, 115 (4th Cir. 1979), cert. denied 445 U.S. 911, 100 S.Ct. 1090, 62 L.Ed.2d 327 (1980).

Id. at 167.

Based on the foregoing, the Court concludes that it is without jurisdiction to consider Alusuisse's motion to reconsider.

Accordingly,

IT IS HEREBY ORDERED that Alusuisse's motion to reconsider [Record No. 15] be, and the same hereby is, **DENIED**.

This the 17th day of July, 1995.

/s/_____
JOSEPH M. HOOD, JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 30, 1995]

No. 95-55

JEFFREY D. BRIERLY,
Administrator of the Estate of
Paul Brierly, deceased,
Plaintiff,

v.

ALUSUISSE FLEXIBLE
PACKAGING, INC., and
DAVID ELLISON
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon motion of the plaintiff, by counsel, to remand. [Record No. 1]. The

defendant, Alusuisse Flexible Packaging, Inc., has responded to the motion; there has been no reply.[1]

BACKGROUND

This action was originally filed in Shelby Circuit Court on May 12, 1994. The complaint alleges that the plaintiff's decedent was killed in an explosion occurring at a plant operated by the defendant, Alusuisse Flexible Packaging, Inc. [Alusuisse]. In addition, the plaintiff asserts that the defendant David Ellison [Ellison] was the Safety and Environmental Officer at Alusuisse at the time of the explosion killing the decedent. On June 2, 1994, Alusuisse filed a petition for removal based on diversity of jurisdiction in the Western District of Kentucky, Louisville division. Ellison, upon whom service of process had not been made at the time the petition for removal was filed, did not join in the removal. By Order dated June 30, 1994, the action was transferred from the Western District to this Court.

The plaintiff filed the instant motion to remand arguing that diversity of jurisdiction did not exist as both the defendant David Ellison and the plaintiff are citizens of the Commonwealth of Kentucky. The plaintiff asserts that as of June 13, 1994, more than a month after the complaint was filed, that Ellison was a citizen of Kentucky residing in

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[1] The Court notes that the merits of this action were stayed per Order dated October 11, 1994 [Record No. 10], which was recently continued by Order dated March 21, 1995 [Record No. 13]. That the merits of this action were stayed has no effect on this Court's ability to consider whether jurisdiction exists to entertain the action.

Louisville, Kentucky. The plaintiff acknowledges that Ellison's employment may have been transferred by Alusuisse to Missouri near the time the instant action was filed but argues that Ellison remained a Kentucky citizen for diversity purposes. The plaintiff's allegations are supported by affidavit.

In response, Alusuisse argues that the citizenship of an unserved defendant may be ignored for purposes of removal jurisdiction. Alusuisse also maintains that his removal petition did not have to joined by Ellison because service of process was never made upon Ellison. Finally, Alusuisse argues that remand is not appropriate solely because the notice of removal was erroneously filed in the Western District rather than the Eastern District.

DISCUSSION

The Sixth Circuit Court of Appeals has determined that a defendant desiring to remove a case has the burden of proving the diversity jurisdiction requirement. Gafford v. General Electric Co., 997 F.2d 150, 155 (6th Cir. 1993). The plaintiff has contested whether diversity of jurisdiction exists claiming that Ellison is a Kentucky citizen. It is undisputed that the plaintiff is a citizen of Kentucky and Alusuisse is a citizen of Illinois.

Rather than producing evidence of Ellison's citizenship, Alusuisse argues that because Ellison had not been served at the time Alusuisse filed the notice of removal, then Ellison's citizenship 'should be ignored altogether for the purposes of considering the plaintiff's Motion to Remand." [Record No. 1, subsection 5, para. 2]. In support of this

proposition, Alusuisse cites Republic Western Insurance v. International Insurance, 765 F.Supp. 628 (N.D. Cal. 1991). The clear distinction between Republic Western and the instant action is elementary. In Republic Western, complete diversity existed between the plaintiff and all the defendants, yet the defendant that removed the action was the only defendant to have been served. See id. at 629 ("At the time that First State filed its notice of removal, no other defendant had been served. It is undisputed that complete diversity of citizenship exists as no defendant in the instant action has the same citizenship as the plaintiff") (emphasis in original). The court determined that where complete diversity existed among all the parties, then "a resident defendant who has not been served may be ignored in determining removability." The court emphasized the requirement that complete diversity must exist in order to invoke the non-served defendant rule when it distinguished the Supreme Court's decision in Pullman Co. v. Jenkins, 305 U.S. 534 (1939):

> Plaintiff's citation to Pullman Co. v. Jenkins (citation omitted) and its progeny (footnote omitted) is inapposite. Pullman stands for the proposition that the presence of a nondiverse, unserved defendant will destroy removability unless that party is dismissed from the action. The Pullman line of cases is inapplicable to the instant case because here complete diversity between the parties exists.

Republic Western, 765 F.Supp. at 629. (emphasis added). Hence, Republic Western does not stand for the proposition that an unserved non-diverse defendant may be ignored for purposes of determining whether the court has jurisdiction

over the action. The law is very clear that federal courts have jurisdiction over cases in which there is complete diversity of citizenship. 28 U.S.C. § 1332. If any defendant is a citizen of the same state as the plaintiff, then diversity of citizenship, and subsequently federal jurisdiction, are destroyed.

The Court must consider then whether Alusuisse, the party invoking the court's jurisdiction, has met its burden of establishing that Ellison is not a citizen of Kentucky. The Court is left only to conclude that Alusuisse has failed to make such a showing.

The Sixth Circuit has clearly articulated the requirements for establishing a person's citizenship for diversity jurisdiction purposes:

> State citizenship for the purpose of the diversity requirement is equated with domicile. A person's previous domicile is not lost until a new one is acquired. Establishment of a domicile is determined by two factors: residence in the new domicile, and the intention to remain there.

Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990) (citations omitted). The plaintiff supported his motion to remand with an affidavit which stated that at least one month after the complaint was filed, the plaintiff maintained a residence in Louisville, Kentucky and had not left any forwarding address. Alusuisse has not presented one shred of evidence to indicate that Ellison resides in a new domicile and intends to stay there. As the party invoking the Court's jurisdiction, the burden is on Alusuisse to make such a

showing. Gafford, 997 F.2d at 155. It has not done so. Hence, the plaintiff's motion to remand will be granted.

Accordingly,

IT IS HEREBY ORDERED:

(1) That the plaintiff's motion to remand be, and the same hereby is, **GRANTED**.

(2) That this matter shall be, and the same hereby is, **REMANDED** to Shelby Circuit Court.

This the 30th day of March, 1995.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 30, 1999]

No. 97-6190

JEFFREY D. BRIERLY, ADMINISTRATOR OF THE ESTATE OF PAUL BRIERLY,
Plaintiff-Appellant,

v.

LAWSON MARDON FLEXIBLE, INC., ET AL.,
Defendants-Appellees.

ORDER

BEFORE: GUY, DAUGHTREY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX L

28 USCS § 1446 & 1447

JURISDICTION AND VENUE

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise,

of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a wavier of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed

thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.
(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 83, 63 Stat. 101; Sept. 29, 1965, P. L. 89-215, 79 Stat. 887; July 30, 1977, P. L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, P. L. 100-702, Title X, § 1016(b), 102 Stat. 4669.)

§ 1447. Procedure after removal generally

(a) in any case removed from a State court, the district court may issue all necessary orders and process to bring before it alt proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 84, 63 Stat. 102; July 2, 1964, P L. 88-352, Title IX, § 901, 78 Stat. 266: Nov. 19, 1988. P.L. 100-702, Title X, § 1016(c). 102 Stat. 4670.)

APPENDIX M

RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

CR 3. COMMENCEMENT OF ACTION FEES AND COSTS

CR 3.01 Commencement of Action

A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Source: FRCP 3; CC 39; KRS 413.250.

APPENDIX N

LABOR AND HUMAN RIGHTS

342.610. Liability for compensation. -- (1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.

(2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontactor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another (a) to have work performed consisting of the removal, excavation or drilling of soil, rock or mineral, or the cutting or removal of timber from land, or (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

(3) Liability for compensation shall not apply where injury, occupational disease, or death to the employee was proximately caused primarily by his intoxication or by his willful intention to injure or kill himself or another.

(4) If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons. (Enact. Acts 1972, ch. 78, § 1, effective January 1, 1973.)

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No. 99-683

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, Deceased,
Petitioner,

v.

ALUSUISSE FLEXIBLE PACKAGING,
INC., DAVID ELLISON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT ELLISON BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should waste judicial resources by reviewing the decision of the Sixth Circuit Court of Appeals, where the law of the Commonwealth of Kentucky and the facts of this case compelled summary judgment in favor of the Respondent Ellison?

II. Whether the Respondent Ellison should be prevented from having access to the Federal Courts where he was not served with process for 18 months and had nothing to do with any procedural missteps by the other Respondent.

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Kentucky at Frankfort, entered October 11, 1994, is not reported and is set forth in the Appendix to this Brief at page 1a.

The Order of the United States District Court for the Eastern District of Kentucky at Frankfort, entered March 21, 1995, is not reported and is set forth in the Appendix to this Brief at page 3a.

STATUTORY PROVISIONS

KRS 342.690 EXCLUSIVENESS OF LIABILITY

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other

benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

KRS 446.080LIBERAL CONSTRUCTION; STATUTES NOT RETROACTIVE; COMMON USAGE; TECHNICAL TERMS

* * *

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

STATEMENT OF THE CASE

Under Kentucky Workers' Compensation laws an employer is generally exempt from civil claims by an employee for injury in the workplace; co-employees, such as the Respondent, David Ellison ("Ellison"), also enjoy an exemption from liability. Only two exceptions are carved out of those exemptions. The first exception is found in KRS 342.610 (4), which will be found at page 97a of the Appendix

to the Petition. That statute provides that a civil cause of action will lie against the employer if injury or death results to an employee through the deliberate intention of his employer to produce such injury or death. No cause of action was stated against Ellison under KRS 342.610 (4) because that statute does not grant a cause of action against a fellow employee such as Ellison. The second exception is found in KRS 342.690 (1), which will be found at page 1a of the Appendix to this Brief. That statute provides that the employer's exemption also extends to co-employees, so long as the injury or death suffered by an employee is not caused by the wilful and unprovoked physical aggression of the co-employee. The Complaint never stated a cause of action under KRS 342.690 (1) because there was no allegation that Brierly's injury or death was caused by the "wilful and unprovoked physical aggression" of Ellison.

Ellison was the Safety Director at the facility of the Respondent, Alusuisse Flexible Packaging, Inc. ("Alusuisse") He was advised that welding was to be done on a machine known as a parts washer, which used solvents to clean ink off parts. He went to the parts washer room and observed that:

> (1) the electricity to the machine was locked out and tagged out; (2) the washing machine and solvent supply reservoir were drained of solvent; (3) the pit below the washer was ventilated with a compressed air hose over the course of the entire weekend to purge any accumulated fumes from underneath the machine; (4) the washing machine door was left open Friday evening so that the interior of the machine could be aired out over the weekend; (5) and a special floor-level ventilation system was left running during the

weekend to help purge the room of fumes.

He smelled no solvent odors in the room. He suggested wrapping portions of the machine with fire retardant blankets and putting water in the bottom of a pit in which the washer sat, in order to prevent residual materials on the floor of the pit from catching fire. There was an apparent misunderstanding between Ellison and other gentlemen about whether an LEL ("Lower Explosive Limit") monitor had been used.

When Ellison was told by another employee of concerns about the possibility of fire during the welding, he and that employee returned to the parts washer room and discussed the precautions that had been taken. Ellison left the room for a period of time and was returning to it when the welding began and the explosion occurred. A spark from the welding torch ignited solvent vapors within the parts washer, blowing a steel door off the washer. The door struck the Petitioner's decedent. When the decedent was killed, he was standing in what was considered to be the safest position in the room.

At the time of the accident, Ellison was a Kentucky resident. On or before May 9, 1994 Ellison left Alusuisse's employ and became a citizen of Wisconsin, so there was complete diversity at the time this action was originally filed on May 12, 1994. A Summons was issued for Ellison on May 12, 1994 and on May 13, 1994 the Shelby County Sheriff made a return indicating that Ellison was no longer a Kentucky resident. On August 11, 1994 one of the attorneys for Alusuisse advised Petitioner's counsel of Ellison's new address and employment. However, Ellison was not served with Summons or pleadings until November 13, 1995. That was in part due to an Order issued by the District Court on

October 11, 1994 in Alusuisse's earlier removal effort and continued by Order dated March 21, 1995. (Appendix to this Brief, pages 1a and 3a, respectively.) However, Brierly never objected to the Order and made no further efforts to serve Ellison until November of 1995. No substantive steps occurred in Shelby Circuit Court, but considerable substantive discovery occurred in the federal action.

The District Court determined that Ellison properly removed the case and that Alusuisse could consent to that removal. Ultimately the District Court granted Ellison's Motion for Summary Judgment and the Sixth Circuit affirmed.

REASONS FOR DENYING THE PETITION

I. WHETHER THIS COURT SHOULD WASTE JUDICIAL RESOURCES BY REVIEWING THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS, WHERE THE LAW OF THE COMMONWEALTH OF KENTUCKY AND THE FACTS OF THIS CASE COMPELLED SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT ELLISON?

Even if the issues framed by Petitioner were worthy of consideration, this is not the case in which to review them. The Court stated in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 Sup.Ct. 467 (1996), at 477:

> To wipe out the adjudication post-judgment and return to state court a case now satisfying all federal jurisdictional requirements would

> impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

In this case, all federal jurisdictional requirements were met. No discovery was conducted in the State court case, while extensive discovery was conducted in the Federal action before the Summary Judgment was granted. The holdings of the courts below were well-founded and returning this case to Shelby Circuit Court would "impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."

The Petitioner would have the Court believe that the lower courts imposed upon him a burden of proof in a civil action greater than that required to support a criminal conviction, but the arguments about "inferred" intent have no relevance to Ellison. In fact, no cause of action was stated against Ellison, because there was no allegation of the single basis on which such a cause of action may be founded. There are two instances in which an injured employee may avoid the exclusive remedies of the Kentucky Workers' Compensation system and file a civil action for damages, neither of which provided the Petitioner any relief against Ellison.

A. *The Petitioner has no cause of action under the first exception to the Workers' Compensation laws.*

The first exception is found in KRS 342.610 (4), which provides:

> If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the

> employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons. (Emphasis added.)

Even if the decedent's injuries and death were considered to have resulted from the deliberate intention of Alusuisse (which Ellison denies), KRS 342.610 (4) grants the Petitioner a cause of action only against Alusuisse, not a fellow employee such as Ellison.

Under any rule of statutory construction, KRS 342.610 (4) must be construed as excluding Ellison from any potential liability to the Plaintiff. Under the rule of *ejusdem generis,* where general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by

the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated. *Woods v. Simpson*, 46 F.3d 21 (6th Cir. 1995); *Steinfeld v. Jefferson County Fiscal Court*, 312 Ky. 614, 229 S.W.2d 319 (1950). Here the use of the word "employer" does not admit the inclusion of the word "employee" into KRS 342.610 (4).

Likewise, under the maxim, *Expressio unius est exclusio alterius*, the express mention of one thing in a statute implies the exclusion of another different thing. *Steinfeld, supra*. The maxim applies where that which is expressed is in such great contrast to that which is omitted that the contrast enforces the affirmative inference that which is omitted must be intended to have opposite and contrary treatment. *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927); *Wade v. Commonwealth*, 303 S.W.2d 905 (Ky. 1957); *George v. Com.*, 885 S.W.2d 938 (Ky. 1994); *Louisville Water Co. v. Wells*, 664 S.W.2d 525 (Ky. 1984). The Kentucky legislature could have easily included the word "employee" in KRS 342.610 (4) but did not, whereas "employer" is mentioned multiple times.

Where there is no exception to the positive terms of a statute the presumption is that the legislature intended none. *Com. Ex Rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992); *Stone v. Kentucky Ins. Guar. Ass'n.*, 908 S.W.2d 675 (Ky. 1995). Where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. *Commonwealth of Ky. Ex Rel. Hancock v. Ruckelshaus*, 362 F.Supp. 360, Aff'd 497 F.2d 1172 (6th Cir. 1974), Aff'd 426 U.S. 167, 96 S.Ct. 2006, 48 L. Ed.2d 555 (1976).

In determining the meaning of legislation, the Court must first look to the plain language of the statute itself; if no ambiguity in the statutory language is found, that language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988). That same philosophy and approach applies to any Kentucky statute. In *Manning v. Kentucky Bd. of Dentistry*, 657 S.W.2d 584 (Ky. 1983), the court stated, at 587:

> The Court's function in the interpretation of statutes is to construe the language so as to give effect to the intent of the legislature. [citations omitted] Where words in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written. [citations omitted] It is presumed that the legislature is acquainted with the law on the subjects on which it legislates and is informed of previous legislation and construction that it has previously received. Where it has made no exception to the positive terms of the statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. [citations omitted]

KRS 446.080 (4) provides:

> All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law,

shall be construed according to such meaning.

The word "employer" has a common and distinct meaning both in law and ordinary usage; an employer is an entity quite distinct from an employee. It must be presumed that the legislature meant to allow a civil cause of action, under the specified circumstances, only against employers. There are no ambiguities in the statute; KRS 342.610 (4) allows a cause of action at law only against an employer.

B. *The Petitioner stated no cause of action under the second exception to the Workers' Compensation laws and Ellison's right to Judgment was compelling.*

> KRS 342.690 (1) provides, in part:
> The exemption from liability given an employer by this section shall also extend to such employer's . . . employees . . . , provided the exemption from liability given an employee shall not apply in any case where the injury or death is proximately caused by the wilful and unprovoked physical aggression of such employee . . . . (emphasis added).

The Complaint stated no cause of action under KRS 342.690 (1) because there was no allegation that the decedent's injury or death was "proximately caused by the wilful and unprovoked physical aggression" of Ellison. The Complaint alleged that Ellison "knew immediately prior to the explosion that [his] intended course of action created a known unsafe and hazardous work environment which could or would result in serious bodily injury or death to . . . Paul Brierly, yet deliberately placed [Brierly] in a position of imminent peril." The Complaint alleged that Ellison "failed and refused to take even the minimum safety precautions

required by local, state and/or federal law, and took affirmative and intentional actions in violation of such laws, all of which caused and brought about the death of [Brierly]."

It was alleged that the death "resulted from the deliberate, wilful and unprovoked intention of . . . Ellison . . . to produce serious injury or death as contemplated by KRS 342.610 (4), and/or KRS 342.690 (1) such that the prosecution of this action is without the restrictions of KRS Chapter 342" and that Ellison's "intentional conduct was undertaken with a deliberate and flagrant indifference to the rights of [Brierly] and with a subjective awareness that such intentional conduct would result in bodily harm or death to [Brierly]."

If those allegations were an attempt to meet the "physical aggression" requirements of KRS 342.690 (1) it was a failed Procrustean effort. There was no physical aggression by Ellison and there is no allegation of such physical aggression.

The Kentucky legislature meant to remove the exclusivity protection from an employee who intentionally and physically attacks another employee without provocation. For example, in *Russell v. Able*, 931 S.W.2d 460 (Ky. 1996), Able approached Russell from behind and intentionally placed her knee to the back of Russell's knee, causing Russell to fall to the floor. Russell was allowed to sue Able, despite the fact that she had recovered compensation benefits. The case makes it apparent that "physical aggression" means exactly what it says; there is no exception for anything less.

Even if the allegations of the Complaint are stretched to encompass "physical aggression", Ellison was entitled to summary judgment because he never committed any act of

physical aggression. It is apparent that even if "deliberate intention" were a criterion applicable to Ellison, he committed no such act. *Fryman v. Electric Steam Radiator Corporation*, 277 S.W.2d 25 (Ky. 1955); *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. 1967). The record is clear that no Alusuisse employee ever contemplated the possibility of an explosion.

C. *No inference of intent operates against Ellison.*

The argument Petitioner makes at pages 25 et seq. of the Petition should be read carefully. There the Petitioner argues that the deliberate intention required by KRS 342.610 (4) may be inferred from circumstances. Whether this is true or not, KRS 342.610 (4) does not apply to employees such as Ellison, but only to employers. The Petitioner carefully fails to mention that distinction in his argument and it is a critical omission.

Moreover, Ellison's acts or inactions would not furnish the basis for such an inference in any event. In *Reddick v. Commonwealth*, 33 S.W. 416 (Ky. 1895), the Court held that a person who caused a hotel to burn, in which fire a person died, could be convicted of murder even though he might deny intent to have caused a death. The Court held, at 417, that this felony of arson:

> . . . clearly belonged to the cases "malum in se" and not merely "malum prohibitum."

In determining whether a fact finder may infer intent in a civil case, Kentucky focuses on the nature of the actions causing the injury. Is the crime malum in se? Is it a heinous act? Is it an act that is certain to cause a harm? Did the effort to perpetrate the act go beyond the casual? Kentucky

does not hold that deliberate intent to injure may be inferred in cases of ordinary claims of negligence. Do the facts of this case come anywhere near meeting the criteria for allowing an inference of intent? Not at all. As the District Court pointed out:

> Surely these gentlemen would have been out of the plant long before the welding started had they planned or even anticipated the possibility of an explosion.

Ellison was manifestly entitled to judgment, and to remand this case to State court would not only be an unwarranted burden on him, it would be a waste of judicial resources.

II. WHETHER THE RESPONDENT ELLISON SHOULD BE PREVENTED FROM HAVING ACCESS TO THE FEDERAL COURTS WHERE HE WAS NOT SERVED WITH PROCESS FOR 18 MONTHS AND HAD NOTHING TO DO WITH ANY PROCEDURAL MISSTEPS BY THE OTHER RESPONDENT.

A. The one year bar does not apply.

28 U.S.C. § 1446 (b) provides, in pertinent part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.

This case was removable as originally filed and Ellison complied with the first paragraph of 28 U.S.C. § 1446(b). The second paragraph deals with cases not removable upon initial filing. It is important to note that the only reference to the one year bar is found within the second paragraph, so the modifying clause applies only to the second paragraph. If Congress intended the one year bar to apply to the entirety of 28 U.S.C. §1446(b), a third sub-paragraph could have easily been inserted, stating that the one year bar applied to all cases. Where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. *Commonwealth of Kentucky, Ex Rel. Hancock v. Ruckelshaus, supra.*

Caterpillar Inc. v. Lewis, supra, does not impose the one year bar on this case. The Petitioner claims that the Supreme Court's statement, that no case may be removed beyond one year, is a ruling by the Supreme Court that the one year bar applies to actions originally removable. That is not correct. *Caterpillar Inc. v. Lewis* was a case which was not originally removable and became removable only after the deletion of other defendants. Thus, the Supreme Court only had before it the question of the one year bar as it applied to

cases which later became removable; whether the one year bar applied to cases removable as originally filed was not a question necessary for resolution.

After the Shelby County Sheriff's return on May 12, 1994 the Petitioner never even attempted to serve Ellison until November of 1995, even though a Wisconsin address was known to the Petitioner's attorney in August of 1994. The Petitioner did not object to the Stay Order of October 11, 1994 or the Order of March 21, 1995 continuing the Stay Order. Moreover, the District Court's Memorandum Opinion and Order of March 30, 1995 (Appendix to Petition at page 83a) points out that the stay was on the merits and did not preclude the Court from rendering its opinion regarding jurisdictional issues; the issue of Ellison's citizenship was a jurisdictional issue, resolution of which was delayed by the Petitioner's failure to effect service until November of 1995.

Petitioner acknowledges that the Fifth and Ninth Circuits have also ruled that the one year limitation applies only to cases not initially removable. Even more significant is this Court's denial of certiorari in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), cert. denied 119 S.Ct 407 (1998). There the Petitioner framed one of his issues as follows:

> I. Does the one year limitation on diversity removal under the 1988 amendments to 28 U.S.C. § 1446 (b) absolutely preclude removal in *all* diversity cases after the limitation period expires, and if not, does the one year limitation period on removal only begin to run from the date when the action stated by the initial pleading setting forth the claim for relief filed in state court was served on the diverse state court defendant, who then filed notice of

> removal more than two years beyond the filing of the original action in state court? (Appendix to this Brief, page 9a)

Thus, the Court has already rejected a Petition to visit this issue, and Ellison respectfully submits that the Court should reject the instant petition.

B. *To construe Alusuisse's vigorous attempts at removal as a waiver would unfairly deprive Ellison of his rights under 28 USC § 1446 (b).*

The Petitioner's cited cases are distinguishable. For example, in *Scialo v. Scala Packing Co., Inc.*, 821 F.Supp. 1276 (N.D. Ill. 1993), the original attempts at removal were woefully inadequate, and a reading of the case makes it apparent that the original defendants attempted to justify their lack of proper removal with spurious reasoning, as detailed by the court at 1277, footnote 3.

In *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986) the original Defendants did not remove the case, but defended it in State court for about four years. Thereafter, new Defendants were named and they proceeded to remove the case; the original Defendants gave their consent to that removal. The Fifth Circuit merely decided that the original Defendants had waived their right to consent, precluding their later consent.

Petitioner misreads *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989). There the Plaintiffs sued Great Republic Insurance Company (GRIC) but the Complaint was answered by Great Republic Life Insurance Company (GRLIC), which even counterclaimed against Cantrell. There was no removal. The Plaintiff then filed an Amended

Complaint, specifically naming GRLIC as a Defendant. The Ninth Circuit held that the original failure to remove was a waiver because GRLIC was acting as a party long before the technical amendment of the Complaint.

In this case, it can hardly be said that Alusuisse waived its right to remove; it may have made procedural missteps, but its actions were all in the course of a vigorous attempt to remove the case.

C. *The Sixth Circuit properly decided that a later served Defendant has 30 days from service in which to remove a case to federal district court.*

Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254 (5th Cir. 1988) did in fact apply a rule of unanimity. However, even that case must be viewed in the context of its facts. There Getty sued three defendants, serving them on September 3rd, September 5th and September 24th, 1986 respectively. The first served Defendant removed timely, with the second served Defendant consenting. The third served Defendant consented, but beyond thirty days from service on the first served Defendant. The court held that all served Defendants must join in the Petition no later than thirty days from service on the first Defendant. Of course, *Getty Oil* deals with a situation in which all of the named Defendants were served within a relatively close time period. *Getty Oil* was criticized in *McKinney v. Board of Trustees of Mayland Com. Coll.*, 955 F.2d 924 (4th Cir. 1992).

The *McKinney* court pointed out that §1446 (b) does not address the issue of multiple defendants and does not say that the time will run from service on the "first served" defendant. The court rejected *Getty Oil* by saying it was not

logical and promoted inequity, not unanimity. To the argument that a Plaintiff should know at the earliest possible date what court he will be in, the court answered that the Plaintiff should get all of the Defendants served at about the same time. Moreover, the court rejected the notion that choosing the forum was "bad" or a "defeat" of the Plaintiff's choice of forum. The court did not believe that Congress meant a Plaintiff's right to choose a forum was of any greater value than a Defendant's right to remove.

Weimer v. City of Johnstown, NY, 931 F.Supp.985 (N.D. NY 1996) points out many reasons why the last served rule was not applied in that particular case. Even in *Weimer*, however, the Court specifically stated, at 993, that "...the Court does not wish to close the door to this line of argument in future cases displaying the characteristics...warranting application of the minority, last-served rule."

The Sixth Circuit was correct. Ellison and Alusuisse have separate counsel. Petitioner's counsel was aware of Ellison's Wisconsin address in August of 1994 but made no effort to serve him for eighteen months. Removals to federal district court are subject to Rule 11 of the federal rules of civil procedure and a later served defendant should be given time to properly analyze the Complaint. 28 U.S.C. § 1446 (b) does not adequately deal with the issue of multiple defendants and it never makes reference to a "first served" defendant. The Sixth Circuit properly decided that to refuse Ellison a right of removal granted him by Congress would be inequitable. The Petitioner's parade of horribles should not persuade this court. The Sixth Circuit has not created a situation where parties wishing to be in state court will be subjected to frequent journeys to federal court and back and the Sixth Circuit certainly did not shift to a Plaintiff the burden of proving nondiversity.

CONCLUSION

There are no compelling reasons why certiorari should be granted in this case. The law and the facts in favor of Ellison are so compelling that it would be a waste of judicial resources for this Court to grant certiorari.

For those reasons, Ellison respectfully submits that the Court should deny the Petition for Writ of Certiorari now pending before this Court.

Respectfully submitted this 17th day of November, 1999.

/s/
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed October 11, 1994]

CIVIL ACTION NO. 94-55

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, deceased
PLAINTIFF,

v. **ORDER**

ALUSUISSE FLEXIBLE PACKAGING, INC.,

and

DAVID ELLISON,
DEFENDANTS.

* * * * * * * *

This matter is before the Court upon the motion of the defendant, Alusuisse Flexible Packaging, Inc. [Alusuisse] to stay further proceedings in this action until the resolution of separate actions stemming from the explosion in question including: pending action before Kentucky Workers' Compensation Board; the pendency of criminal charges

against Alusuisse; and the pendency of three separate actions against Alusuisse other than the instant action. [Record No. 4]. The plaintiff has failed to respond.

Having considered the record and being otherwise advised,

IT IS HEREBY ORDERED:

(1) That the motion of the defendant to stay further proceedings [Record No. 4] be, and the same hereby is, GRANTED.

(2) That all further proceedings in this matter SHALL BE STAYED pending further Orders from this Court.

(3) That the parties shall file a joint status report within the earlier of 120 days from the date of entry of this Order or when the case proceeding before the Kentucky Workers' Compensation Board has been resolved.

This the 4th day of October, 1994.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 21, 1995]

CIVIL ACTION NO. 94-55

JEFFREY D. BRIERLY, Administrator of
the Estate of Paul Brierly, deceased,
PLAINTIFF,

v. **ORDER**

ALUSUISSE FLEXIBLE PACKAGING,
INC.,
DEFENDANT.

The Court having considered the parties' status reports [Record Nos. 11 & 12], and being duly advised, accordingly,

IT IS ORDERED that the STAY in the above-captioned matter entered by this Court on October 11, 1995, shall continue in full force and effect pending further orders.

IT IS FURTHER ORDERED that the parties file a joint status report within the earlier of 180 days from the date of entry of this Order or when the case proceeding before the

Kentucky Workers' Compensation Board has been resolved.

This the 21st day of March, 1995.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX C

KRS 342.690 (1)

KRS 342.690 EXCLUSIVENESS OF LIABILITY

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or

carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

APPENDIX D

KRS 446.080 (4)

KRS 446.080LIBERAL CONSTRUCTION; STATUTESNOT RETROACTIVE; COMMON USAGE; TECHNICAL TERMS

* * *

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

APPENDIX E

No._____
In The
Supreme Court of the United States
October Term, 1997

JOE B. RITCHEY,

Petitioner,

v.

UPJOHN COMPANY and WILLIAM DEMENT,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the one year limitation on diversity removal under the 1988 amendments to 28 U.S.C. § 1446(b) absolutely preclude removal in *all* diversity cases after the limitation period expires, and if not, does the one year limitation period on removal only begin to run from the date when the action stated by the initial pleading setting forth the claim for relief filed in state court was served on the diverse state court defendant, who then filed notice of removal more than two years beyond the filing of the original action in state court?

2. Does removal of a case by a diverse defendant under 28 U.S.C. § 1446(b) on grounds of fraudulent joinder based on the bald and frivolous claim that plaintiff could not possibly prevail in state court under state law against non-diverse defendants, unconstitutionally vet the judicial power in the United States courts beyond Article III, Section 2 of the United States Constitution when any alleged pleading deficiencies could have been readily cured by amendment to the original state court complaint which had not even once yet been amended in state court?

3. Is a diversity case removable under 28 U.S.C. §1446(b) on grounds of alleged fraudulent joinder of nondiverse parties where the district court found, in the absence of any discovery and in the face of comprehensive and detailed countervailing declaration, that the pro se plaintiff could not possible prevail against a statute of limitations and res judicata defense for state law common law fraudulent concealment, deceit and conspiracy by a pharmaceutical manufacturer and its so-called independent FDA

advisors who allegedly, for payments from Upjohn of more than $2,000,000 per year, concealed research from and misled the Food and Drug Administration to prevent the timely discovery of the cause of injury and cause of action by the petitioner - even though the offered new and independent State resident actions tolled the statutes of limitations under California law and the state law conspiracy was only discovered by the plaintiff less than 6 months before the filing of this action in state court.

Supreme Court, U.S.
FILED
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CLERK

(3)

No. 99-683

IN THE

Supreme Court of the United States

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, Deceased,

Petitioner,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.,
DAVID ELLISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALUSUISSE FLEXIBLE PACKAGING, INC.

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3118

STATEMENT PURSUANT TO RULE 29.6

There is no parent or publicly-held company owning ten percent (10%) or more of the stock of Lawson-Mardon Flexible, Inc. f/k/a Alusuisse Flexible Packaging, Inc.

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STATEMENT OF THE CASE

A. Facts

The petitioner's decedent, Paul Brierly, was killed in an explosion in the course and scope of his employment with the respondent, Alusuisse Flexible Packaging, Inc. ("Alusuisse") on August 30, 1993, in Shelby County, Kentucky. Rather than pursuing workers' compensation benefits in Kentucky, Brierly's administrator elected to file a wrongful death action based upon the assertion that Alusuisse and a co-employee, David Ellison, "deliberately intended" to kill Brierly, which, it was suggested, exempted him from the exclusive remedy provisions of the Kentucky Workers' Compensation Act. KRS 342.690(1); KRS 342.610(4).

Alusuisse manufactures materials for packaging and labeling. The printing press components which are used to produce the labels develop a buildup of ink and must be disassembled and cleaned periodically with certain solvent cleaning solutions that are flammable.

Three days before the accident, a seal on the machine which was used in the cleaning operation broke and developed a leak. Plans were made to repair the equipment on the following Monday, August 30, 1993. Numerous precautions were taken to minimize the possibility that welding (which was required in order to complete the repairs) would ignite sparks, thereby creating a fire hazard. Some concern had been expressed prior to the work about the possibility of the ignition of sparks during the welding process. The maintenance supervisor and other employees, however, felt that the precautions were sufficient to minimize the danger.

The employees believed that an "LEL" meter would be used during the process to measure the lowest explosive limit of solvent vapor in the area before use of a flammable source. After the explosion, however, it was discovered that no such meter had been used.

A crew was assembled to extinguish any stray sparks with fire extinguishers. Nevertheless, during the process, a spark ignited undetected residual solvent fumes, causing an explosion. The explosion blew off a steel door on the opposite end of the machine. Brierly, who was about 12 feet away, was struck by the door, resulting in his death.

Based upon findings of insufficient safety precautions, the Kentucky Labor Cabinet assessed a $24,500 civil penalty against Alusuisse. The Kentucky Fire Marshal's Office concluded that the explosion was accidental. A Coroner's Jury also found that the explosion was accidental, but concluded that Alusuisse "deliberately placed the decedent (Brierly) and other employees in a known unsafe and hazardous position." It recommended that the case be submitted to the Shelby County Grand Jury. The Grand Jury indicted Alusuisse for reckless homicide under KRS 507.050, a Class D felony. The indictment stated that Alusuisse "recklessly caused the death of Paul D. Brierly by failing to perceive the substantial and unjustifiable risk of explosion which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation as it then existed."

Brierly's administrator filed this action in the Shelby Circuit Court on May 12, 1994, naming Alusuisse and David Ellison, a co-employee, as defendants. (Petitioner's Appendix B and F).

B. Nature of the Proceedings

Within 30 days of service and simultaneous receipt of the Complaint, Alusuisse removed the action to the Federal District Court for the Eastern District of Kentucky on the basis of diversity jurisdiction. Brierly's motion to remand was granted on March 30, 1995, upon the grounds that Alusuisse had failed to establish diversity by showing that Ellison had removed his domicile from Kentucky at the time suit was filed. A subsequent motion to reconsider was denied by the district court upon the grounds that 28 U.S.C. § 1447(d) divested it of jurisdiction. The district court also remanded the case following Alusuisse's second notice of removal.

On November 10, 1995, Brierly filed an amended complaint and for the first time effected service upon Ellison. Ellison removed on the basis of diversity, and Alusuisse consented to Ellison's removal in a timely fashion. The district court denied Brierly's motion to remand following Ellison's removal and subsequently awarded summary judgment to both Alusuisse and Ellison on the merits of Brierly's claim.

The United States Court of Appeals for the Sixth Circuit upheld both the district court's jurisdiction and its award of summary judgment. Brierly's petition for writ of certiorari has ensued. (Petitioner's Appendix A and B).

REASONS FOR DENYING THE WRIT

I.

IN MULTIPLE DEFENDANT CASES, 28 U.S.C. SECTION 1446(b), PROVIDES EACH DEFENDANT WITH 30 DAYS TO FILE A NOTICE OF REMOVAL REGARDLESS OF ANY REMOVAL EFFORT(S) BY AN EARLIER-SERVED DEFENDANT.

The petitioner argues that in all cases a last-served defendant must remove within 30 days of service upon the first-served defendant regardless of the time of service upon him. The Sixth Circuit characterized this rule as "unfair" while recognizing that the question has divided both the courts and the treatises. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999). *See, generally*, 14C WRIGHT MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3rd, § 3732 at 39 (1998); MOORE'S FEDERAL PRACTICE, § 107.30[3][a] (3rd ed. 1999).

Candor requires that we concede a split of authority on the immediate question, but we will not agree that the division is as well-defined as suggested by the petitioner.

The question presented is governed by 28 U.S.C. § 1446(b), which recites as follows:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action

> or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Numerous authorities have recognized that prevailing equitable considerations often justify permitting the last-served defendant to file its notice of removal within 30 days of service upon it. At least six such policy considerations have been advanced:

(1) Section 1446(a) speaks of removal by "a defendant or defendants. . . ." If Congress had intended the 30-day period to commence upon service of the first defendant, it could easily have so stated. *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 709 (N.D. Cal. 1994).

(2) The unanimity requirement (that all defendants consent to removal) does not support the harsh first-served rule. The unanimity requirement derives from *Chicago, Rock Island, & Pac. Ry. Corp. v. Martin*, 178 U.S. 245, 248, 20

S. Ct. 854, 855, 44 L. Ed. 1055, 1056 (1900), wherein this Court explained that if all defendants did not join, the plaintiff would be forced to divide the suit into several controversies. A defendant cannot sever an action that the plaintiff elected to make joint. The absolute veto for removal which every defendant has exists regardless of when the removal period commences. There is no reason why the unanimity rule cannot coexist with the last-served rule. *Ford v. New United Motors Mfg., Inc., supra*, at 709; *Collings v. E-Z Serve Convenience Stores, Inc.*, 936 F. Supp. 892, 894 (N.D. Fla. 1996).

(3) The interest of settling the forum early does not justify foreclosing subsequently-served defendants from their statutory right to remove. There can be no real prejudice to a plaintiff, given the control which the plaintiff asserts over any possible prejudice associated with service. "The decision to file suit, whom to sue, when to file suit, and when to serve the complaint are within the exclusive province of the plaintiff." *Ford v. New United Motors Mfg., Inc., supra*, at 710.

(4) The last-served rule precludes plaintiffs from circumventing the rights afforded defendants by deliberately manipulating the timing of service. The removal procedure is intended to be fair to all parties, and the prospect of a defendant not having the opportunity to remove for reasons completely beyond its control is unjust. *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924 (4th Cir. 1992); *Ford v. New United Motors Mfg., Inc., supra*, at 710; *Collings v. E-Z Serve Convenience Stores, Inc., supra*, at 894-95.

(5) The 1988 amendments made petitions for removal subject to Rule 11. This amendment has been characterized as providing "further reason to allow all defendants a full thirty days to investigate the appropriateness of removal." *McKinney v. Board of Trustees of Mayland Community College*, *supra*, at 928. Otherwise, later-served defendants will be required to hurriedly join in a petition for removal and face possible Rule 11 sanctions. "Congress surely did not intend to impose such a Hobson's choice on later served defendants." *McKinney*, *supra*, at 928.

(6) In order to justify application of the first-served rule, it would be necessary for a court to insert the word "first" before "defendant" in the statute. This would constitute an invasion of the congressional prerogative. *McKinney v. Board of Trustees of Mayland Community College*, *supra*, at 927.

The first-served rule is based upon the concept of "waiver." However, in the case at bar, the district court found that Alusuisse's "zealous pursuit of removal is clearly at odds with waiver of the right to remove." *Brierly v. Alusuisse Flexible Packaging, Inc.*, 913 F. Supp. 517, 521 (E.D. Ky. 1996). Alusuisse filed two removal petitions, a motion to reconsider, and a consent to Ellison's removal. Alusuisse's actions were certainly inconsistent with any concept of waiver.

The petitioner suggests that four circuits have considered the question at hand and that the Sixth Circuit stands alone in adopting the last-served rule. Respectfully, this is inaccurate. The Sixth Circuit relied upon *McKinney v. Board of Trustees of Mayland Community College*, *supra*, and though it found the facts to be somewhat different, recognized that the "policy considerations articulated by the Fourth Circuit in *McKinney* are equally applicable to the facts before this court." 184 F.3d at 533.

The petitioner cites *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989), as supporting the first-served rule. In that case, however, the two defendants, Great Republic Life Insurance Company (GRLIC) and Great Republic Insurance Company (GRIC) were for all practical purposes alter egos. The life insurance company, which was added by amended complaint, was represented by the same counsel as the other defendant. The later-served defendant had actually engaged in some pretrial discovery before it was added as a party. The Ninth Circuit, in reversing the district court's ruling that the removal was timely, observed that the district court failed to "consider the fact that GRLIC had acted as a 'party' to the action long before the filing of the amended complaint, by answering and cross-complaining in response to Cantrell's original complaint and by responding to Cantrell's Requests for Admission." 873 F.2d at 1254.

The equitable considerations in *Cantrell* run in a different direction from those in the case at bar.

The Fifth Circuit has held that all first-served defendants must join in a petition for removal no later than 30 days from the date on which the first defendant was served. *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986); *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988). However, as the Court in *McKinney* noted, the legislative history of Section 1446(b) does not address the situation where multiple defendants are served on different dates. The rule in the Fifth Circuit does not promote unanimity, but rather inequity. It would certainly seem that a defendant's right of removal is at least as important as the plaintiff's right to choose his forum.

Numerous courts have held that even if an earlier-served defendant does not attempt to file for removal within its own 30-day period, it may join in a timely removal petition filed by a later-served defendant. *Garside by Garside v. Osco Drug, Inc.*, 702 F. Supp. 19 (D. Mass. 1988); *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311 (N.D. Ill. 1993); *Ford v. New United Motors Mfg., Inc.*, *supra*; *Collings v. E-Z Serve Convenience Stores, Inc.*, *supra*; *Adams v. Lederle Laboratories*, 569 F. Supp. 234 (W.D. Mo. 1983); *Freeman v. Bechtel*, 936 F. Supp. 320 (M.D. N.C. 1996).

The petitioner cites *Weimer v. City of Johnstown, N.Y.*, 931 F. Supp. 985, 991, n.6 (N.D. N.Y. 1996), which did adopt the first-served rule under the circumstances there presented, but which distinguished the district court's decision in the case at bar upon the grounds of equitable considerations. In *Weimer*, the defendants shared the same attorneys and, as in *Cantrell*, were entitled to no equitable considerations.

Subsequent to *Brown* and *Getty Oil*, the Fifth Circuit recognized that "it is within the equitable power of the court to reconsider such exceptional circumstances on a case by case basis." *Dole v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992).

II.

THE ONE-YEAR LIMITATION FOR REMOVAL BASED ON DIVERSITY APPLIES ONLY TO CASES THAT ARE INITIALLY NON-REMOVABLE.

In 1988, Congress amended the second paragraph of 28 U.S.C. § 1446(b) to prevent a defendant from removing a case based on diversity jurisdiction more than one year after commencement of the action. The paragraph recites:

> *If the case stated by the initial pleading is not removable*, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a *case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

(emphasis added).

Those circuits which have considered the question have unanimously held that the limitation applies only to actions that become removable sometime after the initial commencement of the action and not to actions that are removable when initially filed. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999) [the underlying decision]; *Ritchey v. Upjohn Drug Company*, 139 F.3d 1313 (9th Cir. 1998); *New York Life Insurance Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998).

The petitioner concedes that the circuit courts are in harmony on this question, but submits that these decisions contravene this Court's holding in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996).

We would respectfully suggest that the *Caterpillar* decision is actually authority for our position. In spite of the language relied upon by the petitioner, the Court in that case was speaking of actions not originally removable. The case is postured in such a way that diversity did not exist at the time of removal but did exist at the time of the district court's decision. Lewis argued that the district court lacked jurisdiction at the time of its judgment. This Court granted certiorari in order to determine whether the absence of complete diversity at the time of removal was fatal to the district court's subsequent adjudication of the case. The Court held that improper removal was not fatal as long as complete diversity existed at the time judgment was entered.

> To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

136 L. Ed. 2d at 452.

Caterpillar, Inc. v. Lewis, *supra*, does not endorse a blanket prohibition. The compelling aspect of this Court's decision in that case is its emphasis on judicial economy rather than strict adherence to a rule which may be subjected to varying interpretations.

In the case at bar, it would be "incompatible with the fair and unprotracted administration of justice" to set aside the district court's adjudication on the merits and remand the case to state court for its determination upon the evidence.

The district court in the case at bar relied in part upon the decision in *Zogbi v. Federated Dept. Store*, 767 F. Supp. 1037 (C.D. Cal. 1991), which held that the one-year limitation against removal of diversity cases applied only to those which are not initially removable rather than to all civil actions. The district court below reasoned: "Placement of the 'except that . . .' clause in the same paragraph as and directly modifying the language dealing with those cases that *become removable* does not allow for a reasonable reading of the limitation to apply to all cases." 913 F. Supp. at 520. (emphasis added).

The court in *Breese v. Hadson Petroleum (USA), Inc.*, 947 F. Supp. 242 (M.D. La. 1996), relied upon the district court's decision in the case *sub judice*. The court there felt that placement of the limitation in the second paragraph "clearly indicates a Congressional intent to restrict the one-year limitation's applicability to those cases that are not initially removable." 947 F. Supp. at 244.

If Congress had intended the limitation to apply to all state court suits, Section 1446(b) would not have been divided into two paragraphs. The *Breese* court reviewed the legislative history of the 1988 amendment and concluded that the amendment's purpose was to discourage removal after substantial progress had been made in the state court, thereby preventing unreasonable delay and disruption. 947 F. Supp. at 244, n.7.

It is an axiomatic general rule of grammar that a qualifying phrase or clause modifies only that which immediately precedes it — not that which may be contained in an earlier paragraph. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 47.33 (5th ed. 1992).

If Congress had intended to preclude removal of all diversity cases commenced more than one year prior to the filing of the notice, it could easily have used language which would accomplish that result.

III.

STRICT CONSTRUCTION DOES NOT MEAN SUCH CONSTRUCTION AS WOULD DEPRIVE A STATUTE OF ITS INTENDED MEANING OR THWART THE LEGISLATIVE PURPOSE.

In suggesting to the court that the case at bar was not removable because of the 30-day rule, the one-year limitation, and the inability of Alusuisse to join in Ellison's petition, the petitioner argues that the decision of the Sixth Circuit fails to comply with this Court's mandate in *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941), which held that removal jurisdiction should be strictly construed.

Federal district courts are authorized to exercise original jurisdiction over controversies involving citizens of different states under Article I, Section 8, of the United States Constitution and 28 U.S.C. § 1332. Congress also conferred upon defendants the right to remove an action from state court to federal court if the district court has original jurisdiction based upon diversity of citizenship. 28 U.S.C.

§ 1441. The congressional purpose was to "secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides." *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111, 18 S. Ct. 526, 530 (1898).

In addition, this Court has declared "that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right. . . ." *Wecker v. National Enameling & Stamping Company*, 204 U.S. 176, 186, 27 S. Ct. 176, 51 L. Ed. 430, 436 (1907).

In *Shamrock Oil & Gas v. Sheets*, *supra*, upon which the petitioner places undue reliance, the Court refused the right of a plaintiff to remove a counterclaim setting up an entirely different cause of action. In so holding, the Court observed that congressional regulation of the jurisdiction of federal courts calls for "strict construction of such legislation."

The petitioner suggests that all of the circuit court and district court decisions which have permitted removal under circumstances similar to those presented in this case do an injustice to the strict construction rule of *Shamrock Oil & Gas v. Sheets*, *supra*, and are indicative of an alarming trend "expanding diversity access to federal court. . . ." (Petition for Writ of Certiorari, at 22).

The petitioner is engaging in semantics. The right to remove is at least as important as the plaintiff's right to choose a forum; and removal on grounds of diversity is based upon the laudable purpose of securing an impartial tribunal.

Furthermore, strict construction, when used in the context of strict compliance with the statute, is not the opposite of liberal construction and does not require, or even

suggest, such a strained or narrow interpretation of language as to defeat the object of a statute. Ordinary words are to be given their ordinary meaning, and well-established rules of grammar must be employed in ascertaining the legislative intent. *Haywood v. Fowler*, 190 Mich. App. 253, 475 N.W.2d 458 (1991); *Appeal of Alex R. Masson, Inc.*, 21 Kan. App. 2d 863, 909 P.2d 673 (1995).

Strict construction is not incompatible with fair construction.

IV.

NEITHER THE 30-DAY NOR THE ONE-YEAR PROVISION OF SECTION 1446(b) IS JURISDICTIONAL.

At the time of the removal and the district court's subsequent disposition of the case on its merits, Section 1447 provided in relevant part as follows:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * *.
>
> (d) an order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*. . . .[1]

(emphasis added).

---

1. Effective October 1, 1996, Congress amended Section 1447(c) by striking "any defect in removal procedure" and inserting in its place "any defect other than subject matter jurisdiction." Pub. L. 104-219, § 1, 110 Stat. 3022. That amendment, however, is not relevant here.

Relying upon the "otherwise" language of Section 1447(d), the petitioner suggests that the district court lost jurisdiction of the case upon the initial remand. He relies upon *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971), and *Federal Deposit Insurance Corporation v. Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979).

The district court agreed that its decision remanding Alusuisse's petition was final. For that reason, it did not entertain our petition for reconsideration or our second petition for removal. However, this does not mean that consideration of Ellison's petition is barred by Section 1447(d). Our second removal petition did not "reinvest" the district court's jurisdiction. The decision remanding our motion was final. However, the district court did have jurisdiction to entertain the separate petition of Ellison, a subsequently-served defendant. This is the principle which distinguishes all three cases upon which the plaintiff relies.

It is generally recognized that neither the 30-day nor the one-year time limit is jurisdictional. They are merely modal and formal. *Barnes v. Westinghouse Electric Corp.*, 962 F.2d 513, 516 (5th Cir. 1992), *cert. denied*, 506 U.S. 999, 113 S. Ct. 600, 121 L. Ed. 2d 536 (1992) (one year); *International Gateway Communications, Inc. v. Communication Telesystems Int'l, Inc.*, 922 F. Supp. 122, 124 (N.D. Ill. 1996) (30 days); *Garside by Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 21 (D. Mass. 1988) (30 days); *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311, 315 (N.D. Ill. 1993) (30 days); *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 708 (N.D. Cal. 1994) (30 days); *Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543, 545 (N.D. Cal. 1989) (30 days).

Again, this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), is relevant. There the district court permitted removal at a time when complete diversity did not exist. If, as Brierly seeks to maintain, that court had no subject matter jurisdiction at that time, its subsequent disposition of that case on the merits was unjustifiable. This Court, however, overlooked the "procedural" irregularities and approved of the district court's resolution of the case on its merits. Since complete diversity did exist at the time judgment was entered, the Court concluded that any other resolution would constitute a *waste of judicial resources*. 136 L. Ed. 2d at 452. The very same considerations prevail in the case *sub judice*.

V.

ALUSUISSE DID NOT WAIVE ITS RIGHT TO REMOVAL AND WAS ENTITLED TO CONSENT TO ELLISON'S NOTICE OF REMOVAL.

The district court held that Alusuisse vigorously pursued its removal rights and, consequently, did not at any time waive its right to remove. The petitioner suggests that Alusuisse, having failed to successfully remove in its initial attempt, cannot "piggy-back" Ellison's later notice of removal. This is little more than a rehash of the petitioner's other arguments. He relies upon *Getty Oil Corporation v. Insurance Company of North America*, 841 F.2d 1254 (5th Cir. 1988), to the effect that there is a single date-of-removal which expires 30 days after service on the first defendant entitled to remove.

Getty Oil, however, has not been followed by many courts which have considered its reasoning. In *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 926-27 (4th Cir. 1992), the Fourth Circuit stated:

> We do not find the *Getty Oil* conclusion to be logical. * * * Although the *Getty Oil* court stated that its rule "promotes unanimity among the defendants," *id*, "unanimity" appears to be an inappropriate word choice. Rather, in establishing one fixed deadline for defendants served as much as thirty days apart, a better term for what the *Getty Oil* rule could lead to is "inequity."

The position taken by the petitioner was also met with disapproval in *Freeman v. Bechtel*, 936 F. Supp. 320, 326 (M.D. N.C. 1996), wherein the Court stated:

> Section 1446(b) provides each defendant in a multi-defendant case with thirty days to file a notice of removal. While a first-served defendant having failed to initiate a removal within thirty days of service may have waived the right to do so, *there is no compelling reason for precluding a first-served defendant from joining in or consenting to a later-served defendant's removal.*

(emphasis added).

At the district court level, Brierly sought to maintain that the court's remand of the Alusuisse petitions barred Ellison's notice under the doctrine of res judicata, or more precisely, issue preclusion. He has abandoned that argument at this level.

The fact is that ultimately the district court determined that diversity existed at the time the action was filed as well as at the time of removal. Therefore, under the rationale adopted by the Supreme Court in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), it was the court's obligation to determine the case on its merits. That determination, in the interest of judicial economy, should stand. The plaintiff should not be allowed to go back to the Shelby Circuit Court and rehash arguments based upon extensive discovery which was undertaken in the federal court.

VI.

WANTON AND MALICIOUS CONDUCT EVIDENCING A CONSCIOUS INDIFFERENCE ON BEHALF OF AN EMPLOYER TOWARD AN EMPLOYEE DOES NOT CONSTITUTE A DELIBERATE INTENTION ON THE PART OF THE EMPLOYER TO PRODUCE INJURY OR DEATH SO AS TO PRECLUDE AN APPLICATION OF THE EXCLUSIVE REMEDY PROVISIONS OF THE KENTUCKY WORKERS' COMPENSATION ACT.

KRS 342.690(1) bars common law tort actions against employers for damages arising out of work-related injuries. The only exception to this provision is where the injury or death "results to an employee through the deliberate intention of his employer to produce such injury or death." KRS 342.610(4). In his Complaint, Brierly alleged:

> 6. That Defendants knew immediately prior to the explosion that their intended course of action created a known unsafe and hazardous work environment which could or would result

> in serious bodily injury or death to its employees, or others, including Paul Brierly, yet deliberately placed Plaintiff's decedent in a position of imminent peril.

(Respondent's Appendix, A).

The leading cases in Kentucky which deal with the "deliberate intention" exception are *Fryman v. Electric Steam Radiator Corp.*, Ky., 277 S.W.2d 25 (1955), and *McCray v. Davis H. Elliott Co.*, Ky., 419 S.W.2d 542 (1967). Both cases were resolved by dispositive motions.

In *Fryman*, the plaintiff-employee alleged that he was required to work with machinery that was defective and dangerous, that his employer was aware of the unsafe condition of the machinery but nevertheless allowed the employee to work around the equipment, and that he failed to install safety devices which would have prevented the employee's injury.

In *McCray*, it was alleged that the employee was required to work in a dangerous place in close proximity to a highly-charged wire, that the employee did not have the experience necessary to appreciate the danger, that the employer was aware of the danger but nevertheless failed to install the proper equipment to minimize the danger, and that as a result the employee was electrocuted.

In both *Fryman* and *McCray* the highest court in Kentucky held that the conduct of neither employer fell within the meaning of the phrase "deliberate intention." The court concluded that wanton and gross negligence does not constitute deliberate intention. The *Fryman* court referred

to numerous cases from other jurisdictions which were in agreement and concluded that the statute must be accepted as written since "the words used in the statute are clear and unambiguous." 277 S.W.2d at 27.

The petitioner's suggestion that an intent to injure or kill can be inferred from reckless or wanton conduct is simply not true.

The district court in the case at bar held that Brierly's "allegations are insufficient to meet the specific or deliberate intent exception and do not constitute an action at law given the exclusive remedy of the Kentucky Workers' Compensation Act." (Petitioner's Appendix, 54a-55a). The district court further observed that "even if all the allegations of negligence and sloppiness are true, this does not add up to a specific intent on behalf of Alusuisse to harm or kill Mr. Brierly." (Petitioner's Appendix, 55a).

Even if Alusuisse's actions constituted gross oversight which would rise to the level of a criminal offense, this would not be relevant to a determination of whether or not that conduct constituted a deliberate intention to injure or kill the employee. Nothing short of a "deliberate intention" to injure the employee falls outside the exclusive remedy provisions of the Kentucky Act. It is universally recognized in workers' compensation cases that a statute permitting an employee's common law action against the employer for work-related injuries requires a finding that the employer had an opportunity to weigh the consequences and made a conscious choice to injure someone. Conscious indifference on the part of the employer does not equate with deliberate intention. *Lusk v. Monaco Motor Homes, Inc.*, 97 Or. App. 182, 775 P.2d 891 (1981).

CONCLUSION

It is respectfully submitted that the petitioner has failed to sustain his burden of establishing that the district court erred for any reason in permitting removal of these proceedings from the state court on the basis of Ellison's petition. The decision below did not involve a compelling question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals correctly held that both decisions of the district court (granting removal and awarding summary judgment) were correct.

Respectfully submitted,

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APPENDIX

APPENDIX — COMPLAINT DATED AND FILED MAY 12, 1994

SHELBY CIRCUIT COURT
NO. 94-CI-00167

JEFFREY D. BRIERLY, Administrator of
the Estate of Paul Brierly, deceased
133 Rockridge Road
Shelbyville, Kentucky 40065

PLAINTIFF

vs.

ALUSUISSE FLEXIBLE PACKAGING, INC.
6700 Midland Industrial Drive
Shelbyville, Kentucky 40065
(SERVE: Secretary of State)
Frankfort, KY 40601

DEFENDANT

and

DAVID ELLISON
(Serve at place of employment)
Alusuisse Flexible Packaging, Inc.
6700 Midland Industrial Drive
Shelbyville, Kentucky 40065

COMPLAINT

** ** ** ** **

Appendix

Comes the Plaintiff, Jeff Brierly, Administrator of the Estate of Paul Brierly, deceased, and for his complaint and cause of action against the Defendants, Alusuisse Flexible Packaging, Inc., and David Ellison, states as follows:

1. That on September 30, 1993, Jeffrey D. Brierly was appointed administrator of the estate of Paul Brierly, deceased, by Order of the Shelby District Court, Probate Division, Action No. 93-P-00209. A copy of the Certificate of Qualification is attached hereto and marked as Exhibit "A".

2. That the Defendant, Alusuisse Flexible Packaging, Inc., is a Missouri corporation conducting or transacting business within the Commonwealth of Kentucky, amenable to service of process pursuant to KRS 454.210 (the Kentucky Long Arm Statute) and/or has failed to appoint or maintain a registered agent in this state, and by virtue of KRS 454.210, the Secretary of State is deemed the statutory agent for service of process.

3. That at all times material hereto, the Defendant, David Ellison, was a resident of the Commonwealth of Kentucky, employed by the co-defendant, Alusuisse Flexible Packaging, Inc., acting as "Safety and Environmental Officer", and acting within the course and scope of his employment.

4. That at all times material hereto, the Plaintiff's decedent Paul Brierly was, a co-op student for maintenance, attending Shelby County Vocational School, and assigned to the defendant, Alusuisse Flexible Packaging, Inc., and acting at the specific direction of supervisors at Alusuisse Flexible Packaging, Inc., including the Defendant, David Ellison.

Appendix

COUNT I

5. That on or about August 30, 1993, in Shelbyville, Shelby County, Kentucky an explosion occurred at the production facility of Alusuisse Flexible Packaging, Inc., which caused and brought about the death of Plaintiff's decedent, Paul Brierly, by reason of which Plaintiff has sustained damages in excess of the minimal jurisdictional amount of this Court.

6. That Defendants knew immediately prior to the explosion that their intended course of action created a known unsafe and hazardous work environment which could or would result in serious bodily injury or death to its employees, or others, including Paul Brierly, yet deliberately placed Plaintiff's decedent in a position of imminent peril.

7. That Defendants failed and refused to take even the minimal safety precautions required by local, state and/or federal law, and took affirmative and intentional actions in violation of such laws, all of which caused and brought about the death of Plaintiff's decedent.

8. That the death of Paul Brierly on August 30, 1993, resulted from the deliberate, wilful and unprovoked intention of the defendant Alusuisse Flexible Packaging, Inc., and David Ellison, to produce serious injury or death as contemplated by KRS 342.610 (4), and/or KRS 342.690 (1) such that the prosecution of this action is without the restrictions of KRS Chapter 342, the Kentucky Workers Compensation Act.

Appendix

COUNT II

9. The Plaintiff repeats, reiterates, adopts and hereby incorporates by reference each and every allegation previously set forth as if fully and completely set forth herein.

10. That on several occasions prior to the explosion of August 30, 1993, the Defendants, Alusuisse Flexible Packaging, Inc. and/or David Ellison, engaged in the same conduct which caused and brought about the explosion of August 30, 1993, to-wit: require employees to start welding without providing or allowing proper ventilation of combustible cleaning solvent vapors; which conduct resulted in "flash" fires.

11. That the occurrence of such "flash" fires is required to be reported to state and local officials in order to prevent the reoccurrence of such safety hazards.

12. That the Defendants, Alusuisse Flexible Packaging, Inc., and/or David Ellison, deliberately and intentionally failed and refused to report the occurrence of such fires to the local and state authorities, as required by law, such that the identical safety hazard was allowed to reoccur on August 30, 1993, by reason of which Paul Brierly is now deceased.

13. That the conduct of the Defendants in deliberately placing Plaintiff's decedent in a known unsafe and hazardous position was and is malicious and oppressive, and the failure to strictly comply with specific safety violation laws constitute fraud, by reason of which the Plaintiff is entitled to punitive and exemplary damages in an amount reasonably necessary to punish and to discourage Defendants and others from engaging in similar conduct in the future.

14. That the damages demanded herein exceed the minimal jurisdictional amount of this Court.

WHEREFORE, Plaintiff respectfully demands and prays as follows:

1. For judgment against the Defendants jointly and severally, in an amount which will fairly and reasonably compensate Plaintiff for his claimed damages;

2. For punitive and exemplary damages in an amount reasonably necessary to punish and to discourage Defendants and others from engaging in similar conduct in the future;

3. For his costs herein expended, including a reasonable fee for his attorney;

4. For trial by jury on all issues so triable;

5. For leave to amend as additional claims or causes of action may be revealed in the course of discovery; and

6. For any and all other relief, in the premises, to which he may appear to be entitled.

s/ Fred E. Fischer
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